

SUMMER, 1959

Volume 4, Number 2

Race Relations Law Reporter

**A Complete, Impartial
Presentation of Basic
Materials, Including:**

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

VANDERBILT UNIVERSITY SCHOOL OF LAW

VANDERBILT UNIVERSITY SCHOOL OF LAW

HARVEY BRANSCOMB, Ph.D., Litt.D., LL.D., D.H.L., *Chancellor*
CHARLES MADISON SARRATT, M.A., LL.D., D.C.L., *Vice-Chancellor Emeritus*
JOHN H. STAMBAUGH, *Vice-Chancellor*
JOHN W. WADE, B.A., LL.B., LL.M., S.J.D., *Dean of the School of Law*
KATHLEEN B. LEONARDT, B.A., *Registrar and Administrative Assistant to the Dean*

WILLIAM R. ANDERSEN, B.S., LL.B., LL.M., *Assistant Professor of Law*
PAUL J. HARTMAN, A.B., LL.B., LL.M., JUR. SC. D., *Professor of Law*
ROBERT E. KENDRICK, B.S., M.A., LL.B., LL.M., *Visiting Associate Professor of Law*
EDMUND M. MORGAN, A.B., A.M., LL.B., *Frank C. Rand Professor of Law*
F. HODGE O'NEAL, A.B., LL.B., J.S.D., S.J.D., *Professor of Law*
LEO J. RASKIND, B.A., M.A., Ph.D., LL.B., *Associate Professor of Law*
THOMAS G. ROADY, JR., A.B., M.A., J.D., *Professor of Law*
PAUL HAMPTON SANDERS, A.B., LL.B., *Professor of Law*
THEODORE A. SMEDLEY, A.B., J.D., *Professor of Law*
HERMAN L. TRAUTMAN, B.A., LL.B., *Professor of Law*
JOHN W. WADE, B.A., LL.B., LL.M., S.J.D., *Professor of Law*
JOHN HOWARD MOORE, A.B., J.D., *Professor of Law Emeritus*

W. RAYMOND DENNEY, LL.B., *Lecturer in Law*
WILLIAM J. HARBISON, B.A., LL.B., *Lecturer in Law*
EDWIN F. HUNT, B.A., LL.B., *Lecturer in Law*
JAMES C. KIRBY, JR., B.A., LL.B., *Lecturer in Law*
CECIL SIMS, LL.B., *Lecturer in Law*
ROBERT W. STURDIVANT, LL.B., *Lecturer in Law*
WILLIAM WALLER, B.S., LL.B., *Lecturer in Law*
CHARLES H. WARFIELD, B.A., LL.B., *Lecturer in Law*

EUGENE G. WYATT, JR., B.A., LL.B., *Associate Director, Race Relations Law Reporter*

MARY ELIZABETH POLK GREEN, B.A., LL.B., *Assistant to the Director of the Law Library*
ANNA INGRAM, *Secretary to the Race Relations Law Reporter*
BETTY CARROLL JONES, *Secretary to the Law Review*
SUHAN R. MUIR, *Secretary to the Faculty*
PAULINE F. WOODARD, *Assistant to the Director of the Law Library*

Bulletin or other information will be supplied on request. Write Vanderbilt University, School of Law, Nashville 5, Tennessee.

Recent Developments ... A Summary

Education

Congress was memorialized by the *Alabama* Legislature to call a constitutional convention to consider proposing an amendment to declare exclusive control of public education to be in the states (p. 389).

Recently enacted *Arkansas* legislation provides for withholding state funds when a student is accepted in a school other than the one that he normally would attend and authorizes payment of funds withheld from integrated schools to other schools, public or private, receiving their transferees (p. 390).

A *California* court held a private professional school, allegedly public because subject to the state's police power to regulate certain operations, not to be a place of "public accommodation" within a statutory prohibition against racial discrimination (p. 305).

A grade-by-grade desegregation plan for *Delaware* public schools, beginning with the first grade in the 1959 fall term, received federal court approval (p. 257).

A *New York* City court held Negro parents not guilty of child neglect in refusing to send children to specified schools attended only by Negroes and Puerto Ricans upon the finding that those schools were educationally inferior in having comparatively few regularly licensed teachers; failure of the boards of education to compel licensed teachers to take posts where needed to equalize educational opportunities was held to be in violation of the Fourteenth Amendment (p. 264).

The Fourth Circuit Court of Appeals affirmed decisions of federal district courts in *North Carolina* dismissing actions to desegregate Montgomery County schools (p. 278) and to secure admission of a Negro boy to a Raleigh "white" public school (p. 281) because of failures to exhaust statutory administrative remedies.

A district court conviction of John Kasper and six others for criminal contempt for committing acts hindering compliance with its order directing desegregation of a Clinton, *Tennessee*,

high school was affirmed by the Sixth Circuit Court of Appeals (p. 285). A recently approved *Tennessee* statute modifies compulsory attendance laws by placing the sole responsibility for their enforcement upon local education officials, providing that for "any good and substantial reason" a child may be withdrawn from one public school and placed in another designated by the local school board or in a private school, and repealing provisions permitting the state education commissioner to deny state appropriations to any local system not complying with such laws (p. 391).

The Fourth Circuit Court of Appeals reversed a decision fixing 1965 as the deadline for compliance by the Prince Edward County, *Virginia*, school board with desegregation orders, directing the district judge to order the board to consider Negro children's applications for admission to the "white" high school so as to permit entrance in September, 1959, and to make plans for desegregating elementary schools "at the earliest practical day" (p. 297). The same court remanded a case in which rejection of Negro students' applications for transfer to "white" Arlington schools by the state placement board had been upheld by a district court, with directions to order the county school board to re-examine the applications expeditiously so that the district court might review any further denials before the opening of the ensuing school term (p. 296). Following a report by the Perrow Commission on Education, making recommendations for "meeting the crisis" caused by judicial decrees affecting *Virginia* schools (p. 392), the legislature enacted statutes designed to accomplish that end (pp. 408-439).

Organizations

After a United States Supreme Court decision that *Alabama* could not constitutionally compel the NAACP to produce membership lists, on remand the state supreme court reaffirmed, except as to such lists, a judgment of contempt against the Association for refusal to obey a lower court

order to produce certain described "books, papers and documents" (p. 347), but the United States Supreme Court on certiorari reversed (p. 254).

The judgment of a federal district court in *Arkansas* staying proceedings by the NAACP in that court to enjoin the enforcement of a state barratry statute and a statute authorizing state officials to compel production of organizations' records, until state courts could rule on their validity (p. 349) was vacated and the case remanded by the United States Supreme Court (p. 254). The *Arkansas* Legislature enacted a statute forbidding the employment of NAACP members by the state or political subdivisions (p. 460).

The conviction of a *Virginia* organization leader of contempt for refusing to answer questions by the Legislative Committee on Law Reform and Racial Activities and by a state circuit court, affirmed by the state Supreme Court of Appeals, was reversed and remanded by the United States Supreme Court for failure to inform him adequately as to the purposes and the pertinency of the Committee's inquiry (p. 247).

Voting

A federal district court action brought by the United States under the 1957 Civil Rights Act against the state of *Alabama*, the Macon County Board of Registrars, and individuals as members of the Board, to have adjudged unconstitutional alleged acts depriving persons of the right to vote was dismissed because the Act does not authorize an action against a state, the Board is a nonsuable entity and not a "person" under the Act, and the individuals had in good faith resigned office (p. 322). A recent approved *Alabama* statute provides that questionnaires and answers of voter registration applicants shall not become public records; prohibits, except upon certain conditions, boards of registrars from disclosing information from such documents; and regulates the disposition of such documents (p. 440).

In an action brought by the United States against Terrell County, *Georgia*, voting officials, alleged to have acted in their official capacity to deprive persons of voting rights, a federal district court held a section of the 1957 Civil Rights Act unconstitutional for authorizing the United States Attorney General to seek injunctions

against private citizens for private actions (p. 314).

Civil Rights

The complaint of a *Michigan* state prisoner seeking compensation under the Civil Rights Act for injuries allegedly inflicted by police officers and others was dismissed in federal district court; and an appeal was dismissed by the Sixth Circuit Court of Appeals for failure to state a cause of action under the Act, because complainant having appealed neither his conviction nor denials of habeas corpus petitions left the state court judgment valid (p. 310).

A district court's refusal to vacate an order dismissing a complaint charging *Pennsylvania* Supreme Court justices with conspiring to deprive complainant of rights covered by the Civil Rights Act was affirmed by the Third Circuit Court of Appeals (p. 309).

A *Kansas* statute recently adopted forbids racial and religious discrimination by operators of hotels, restaurants, places of amusement and public transportation facilities and persons in charge of state educational institutions (p. 440).

Employment

The President's Committee on Government Contracts reported on its 1953-58 activities in carrying out a nondiscrimination policy in employment under government contracts (p. 477).

Legislation forbidding discriminatory employment practices and creating an administrative and enforcement commission was enacted in *California* (p. 441) and *Ohio* (p. 446).

Annual reports on activities concerning fair employment practices and public accommodations were issued by *Colorado* (p. 471) and *Rhode Island* (p. 467) anti-discrimination commissions.

Public Accommodations

A *Delaware* court, holding that a state agency leasing space in a public parking building to a restaurant proprietor was not entering merely a landlord-tenant business relationship but was financing a public facility, enjoined racial discrimination against Negro patrons as violative of equal protection (p. 353).

A decision of the *New Jersey* Division Against Discrimination that a restaurant proprietor had

discriminated against a Negro group by refusing to reserve for them a "private" dining room was affirmed by a state court holding such action to violate statutory prohibitions covering places of "public accommodation" (p. 355).

A *New York* court found swimming pool owners in contempt for disobeying the court's order to take steps specified by the State Commission Against Discrimination to serve colored complainant and all others equally (p. 358).

Housing

Newly enacted *Colorado* legislation prohibits racial and religious discrimination in leasing and transferring housing (p. 454), and a *Massachusetts* statute forbidding such discrimination as to "publicly assisted housing" was expanded to include "multiple dwellings" and "contiguously located housing accommodations" (p. 453).

A *New York* State Commission Against Discrimination announcement of a hearing on charges of discrimination against Negroes attempting to buy a dwelling in a publicly-assisted housing development in Poughkeepsie was followed by a sale to complainants (p. 482).

The *Washington* State Board Against Discrimination found that Seattle owners of an FHA-financed home advertised for sale were guilty of a statutory "unfair practice" in refusing to negotiate with interested Negroes and ordered a sale to the latter (p. 485).

Governmental Facilities

A Negro inmate of a *California* prison unsuccessfully sought in federal district court to have prison administrators either restrained from maintaining racial segregation or required to transfer him to a prison not practicing segrega-

tion. The court held that no federal question was presented, stating that the rationale of the *School Segregation Cases* did not apply (p. 313).

Trial Procedure

The Fifth Circuit Court of Appeals reversed a district court decision on a petition for habeas corpus that a Negro convicted in a *Mississippi* trial court had waived the issue of an alleged systematic exclusion of Negroes from his trial jury, finding that there was an unrefuted "strong prima facie case" of systematic exclusion that had not been waived (p. 377).

Because of lack of evidence to support the motions, the Supreme Courts of *Louisiana* (p. 387) and *North Carolina* (p. 366), and the *Texas* Court of Criminal Appeals (p. 373 and p. 387) affirmed trial court denials of motions to quash, made by defendants in criminal prosecutions, on grounds of alleged systematic exclusion from juries of persons of their race.

Miscellaneous

The United States Supreme Court affirmed a district court decision holding *Louisiana* prescriptions against "mixed" athletic contests violative of equal protection (p. 251).

The Fifth Circuit Court of Appeals reversed a decision that a bus company was not liable for damages suffered by an apparently "mixed" couple seated toward the front of a bus in *Florida* from an assault by a fellow (white) passenger, holding that company employees had failed to take proper precautions in an obviously dangerous situation (p. 361).

Louisiana's miscegenation statute was upheld by the state supreme court (p. 334). A similar *Nevada* statute was repealed (p. 451).

BOARD OF EDITORS:

Director	Paul H. Sanders
Associate Directors	Theodore A. Smedley
	Robert E. Kendrick
	Eugene G. Wyatt, Jr.
Adviser	John W. Wade
Chief Editorial Assistant	Roger G. White
Editorial Assistants	Adam G. Adams
	David E. Rodgers
	George Schreiner
	Edgar E. Smith

The *Race Relations Law Reporter* is published four times a year, spring, summer, fall and winter, by the Vanderbilt University School of Law at Nashville 5, Tennessee. Second-class postage paid at Nashville, Tennessee. Subscription price \$3.00 per year. If purchased separately, \$1.00 per regular issue. Mailing address: P.O. Box 6156 Acklen Station, Nashville, Tennessee.

ORIGINAL MATERIAL COPYRIGHT 1959 BY VANDERBILT UNIVERSITY SCHOOL OF LAW

(Permission to reprint copyright material will be liberally conferred. Application for permission to reprint should be addressed to the Director, *Race Relations Law Reporter*.)

TABLE OF CONTENTS

UNITED STATES SUPREME COURT

Organizations

LEGISLATIVE INVESTIGATION

Virginia: *Scully v. Commonwealth of Virginia ex rel. Committee on Law Reform and Racial Activities (USSC)*, p. 247

Miscellaneous Orders, p. 251

COURTS

Education

PUBLIC SCHOOLS

Delaware: *Evans v. Buchanan*, (USDC, D. Del.), p. 257

New York: *In the Matters of Skipwith, etc.*, (Dom. Rel. Ct. N.Y.), p. 264

North Carolina: *Covington v. Edwards*, (USCA, 4th Cir), p. 278

Holt v. Raleigh City Bd of Ed, (USCA, 4th Cir), p. 281

Tennessee: *Bullock v. United States; Kasper v. United States*, (USCA, 6th Cir), p. 285

Virginia:

Arlington: *Hamm v. County School Bd of Arlington County; County School Bd of Arlington County v. Deskins*, (USCA, 4th Cir), p. 296

Prince Edward County: *Allen v. County School Bd of Prince Edward County*, (USCA, 4th Cir), p. 297

COLLEGES AND UNIVERSITIES

Texas: *Heaton v. Bristol (Ct of Civil Appeals of Texas)*, p. 302

PRIVATE SCHOOLS

California: *Reed v. Hollywood Professional School*, (Superior Ct., App. Div., Los Angeles Co., Calif.), p. 305

Civil Disturbances

INTERRACIAL

North Carolina: *State v. Cole*, (Sup Ct of N.C.), p. 308

Civil Rights

JUDICIAL DECISION

Federal Statutes: *Ginsburg v. Stern*, (USCA, 3rd Cir), p. 309

STATE JUDGMENTS

Federal Statutes: *Curtis v. Tower* (USCA, 6th Cir), p. 310

Civil Rights Statutes

STATE ACTION

Virginia: *Grove v. Smyth*, (USDC, ED Va), p. 311

Criminal Law

CONSPIRACY, MAYHEM

Alabama: *Mabry v. State*, (Ct of Appeals of Ala), p. 312

INDIANS

California: *Petition of Carmen*, (USDC, ND Calif), p. 313

Elections

REGISTRATION

Civil Rights Act: *United States v. Raines*, (USDC, MD Ga), p. 314

United States v. State of Alabama, (USDC, MD Ala), p. 322

Louisiana: *Tullier v. Giordano*, (USCA, 5th Cir), p. 329

Employment

LABOR UNIONS

Federal Statutes: *Brady v. Transworld Airlines* (USDC, D. Del), p. 333

Family Relations

MISCEGENATION

Louisiana: *State v. Brown*, (Sup Ct of La), p. 334

Governmental Facilities

GOLF COURSES

Florida: *Hampton v. City of Jacksonville*, (USDC, SD Fla), p. 339

PRISONS

California: *Nichols v. McGee*, (USDC, ND Calif), p. 340

Indian Reservation

JURISDICTION

South Dakota: *State v. Jameson*, (Sup Ct of S. Dak), p. 342

Indians

INDIAN LANDS

Montana: *United States v. Frisbee*, (USDC, Montana, Great Falls Div), p. 343

New York: *St. Regis Tribe of Mohawk Indians v. State*, (Ct of Appeals, N.Y.), p. 343

Tuscarora Indian Nation v. Federal Power Commission, (USCA, D.C.Cir), p. 344

TAXATION

South Dakota: *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, (USCA, 8th Cir), p. 346

TAXATION, VOTING

New York: *State Tax Commission v. Barnes*, (County Ct, Franklin County, N.Y.), p. 347

TABLE OF CONTENTS

Organizations

NAACP

- Alabama:* Ex Parte NAACP; In re State ex rel. Patterson v. NAACP, (Sup Ct of Ala.), p. 347
Arkansas: NAACP v. Bennett, (USDC, ED Ark), p. 349
Georgia: NAACP v. Williams, (Ct of Appeals of Ga.), p. 351

Public Accommodations

RESTAURANTS

- Delaware:* Burton v. Wilmington Parking Authority, (Ct in Chancery, New Castle County, Del), p. 353
New Jersey: Evans v. Ross, (Camden County Ct, Law Div), p. 355

SWIMMING POOLS

- New York:* New York SCAD against Ackley-Maynes Co., Inc., (N.Y. Sup Ct, Albany County, Special Term), p. 358

Transportation

BUSES

- Florida:* Bullock v. Tamiami Trail Tours, Inc., (USCA, 5th Cir), p. 361

Trial Procedure

GRAND JURIES

- North Carolina:* State v. Perry, (Sup Ct of N.C.), p. 366
Texas: Williams v. State, (Ct of Criminal Appeals of Texas), p. 373

JUDGES

- Alabama:* NAACP v. Jones, (Sup Ct of Alabama), p. 376

JURIES

- Mississippi:* U.S. ex rel. Goldsby v. Harpole, (USCA, 5th Cir), p. 377

PETT JURIES

- Louisiana:* State v. Coleman, (Sup Ct of La), p. 387
Texas: Morales v. State, (Ct of Criminal Appeals of Texas), p. 387

LEGISLATURES

Education

PUBLIC SCHOOLS

- Alabama:* Act No. 5, memorializing Congress to call constitutional convention, p. 389
Arkansas: Act No. 151, amendment re withholding of state funds from closed schools, p. 390
Tennessee: Chapter No. 289, amendment to compulsory attendance laws, p. 391
Virginia: Perrow Commission report, p. 392
 Chapter 46, authorizing county school boards to borrow for school construction purposes, p. 408
 Chapter 49, reimbursement for transporting

children in nonsectarian private schools, p. 411
 Chapter 50, discharge of State Board of Education loan by teaching in nonsectarian private school, p. 412

Chapter 51, payment of warrants only from funds appropriated for the purpose, p. 412
 Chapter 52, fixing and making of county, city, town and district levies by their governing bodies, p. 413

Chapter 53, payment of tuition for students residing in one locality but attending nonsectarian private schools in another, p. 415

Chapter 69, duties of certain county officials; applications of moneys of cities and towns; purpose of certain budgets, etc., p. 417

Chapter 71, requiring State Bd of Ed to provide rules for placement of pupils, etc., p. 425
 Chapter 72, provisions for compulsory attendance, p. 429

Chapter 79, management and control of funds available to school boards, etc., p. 432

Chapter 81, power of local school boards to regulate school attendance and tuition charges; repealing provisions relating to tuition charges, p. 439

Civil Rights

STATE ACTION

- Kansas:* House Bill No. 467, prohibits making of distinctions on account of race, color, etc., by persons in charge of state institutions, hotel managers, etc., and provides penalties for violation, p. 440

Elections

REGISTRATION

- Alabama:* Act No. 54, amendment to statute relating to voter registration applications, providing for disposition of records, p. 440

Employment

FAIR EMPLOYMENT LAWS

- California:* Chapter 121, prohibiting discriminatory employment practices; creating State FEPC and defining its functions, p. 441

- Ohio:* Section 4112.01 to 4112.08, prohibiting discriminatory employment practices; creating Ohio civil rights commission and defining its powers and duties, p. 446

Family Relations

MISCEGENATION

- Nevada:* Senate Bill No. 19, repeal of miscegenation statute, p. 451

Housing

MULTIPLE-DWELLING, CONTIGUOUSLY LOCATED HOUSING ACCOMMODATIONS

- Massachusetts:* Chapter 239, amendment to statute prohibiting discrimination in certain types of housing, p. 453

PRIVATE HOUSING

- New York:* N.Y. City Council resolution re support of Fair Housing Practices Law, p. 453

TABLE OF CONTENTS

UNFAIR HOUSING PRACTICES

Colorado: House Bill No. 259, prohibiting discriminatory activities in transfer or leasing of housing, p. 454

Legislatures

LEGISLATIVE IMMUNITY

Alabama: Act No. 8, condemning action of federal marshal in serving subpoena on legislator, p. 459
Act No. 88, providing for immunity of legislators from arrest and service of process under certain conditions, p. 460

Organizations

NAACP

Arkansas: Act No. 115, unlawful for state, school district, counties or cities to employ members of NAACP, p. 460

Resettlement

UNEMPLOYED PERSONS

Alabama: Authorization for Wilcox County to institute resettlement program for unemployed persons, after approval by referendum, p. 462

ADMINISTRATIVE AGENCIES

Education

PUBLIC SCHOOLS

Alabama: Birmingham Bd of Education letter of denial of application for re-assignment of pupil, p. 465
Florida: Excerpt from minutes of Dade County, Fla., School Bd, p. 465

PUBLIC SCHOOLS, COLLEGES AND UNIVERSITIES

Mississippi: State Sovereignty Commission question-and-answer report, p. 466

Employment, Public Accommodations

ANTI-DISCRIMINATION LAWS

Rhode Island: Rhode Island Anti-Discrimination Commission report, p. 467

ANTI-DISCRIMINATION LAWS, FAIR EMPLOYMENT LAWS

Colorado: Fourth Annual Report, Colorado Anti-Discrimination Commission, p. 471

ECONOMIC STATUS

Mississippi: State Sovereignty Commission "Fact Sheet," p. 470

GOVERNMENT CONTRACTS

Presidential Committee: Committee on Government Contracts report, p. 477

LABOR RELATIONS

Federal Statutes: Neco Electrical Products Corp. and International Union of Electrical, Radio & Machine Workers, AFL-CIO, p. 481

Housing

PUBLICLY-ASSISTED HOUSING

New York: Waite v. South Gate Estates, (New York SCAD), p. 482
Washington: In the Matter of Jones and O'Meara (Washington St Bd Against Discrimination), p. 485

Organizations

NAACP, COMMITTEE OF 100

Federal Income Tax Exemption: Byrd correspondence re NAACP Committee of 100, p. 490

ATTORNEYS GENERAL

Education

FRATERNITIES

California: Opinion re constitutionality of recognition of discriminatory organizations, p. 493

REFERENCE

Bibliography, p. 503

Cumulative Table of Cases, p. 509

UNITED STATES SUPREME COURT

ORGANIZATIONS

Legislative Investigation—Virginia

David H. SCULL v. COMMONWEALTH OF VIRGINIA ex rel. COMMITTEE ON LAW REFORM AND RACIAL ACTIVITIES.

United States Supreme Court, May 4, 1959, No. 51, _____ U.S. _____, 79 S.Ct. 838.

SUMMARY: Scull, a leader of the "Citizens Clearing House on Public Education," a Northern Virginia group advocating compliance with the *School Segregation* decisions, was subpoenaed to appear and testify before the Virginia Legislative Committee on Law Reform and Racial Activities [established by Chapter 37 of the 1956 Extra Session Acts of Virginia, 2 Race Rel. L. Rep. 1023 (1957)]. Before the committee he stated that the language of the subpoena was so broad and vague that he wished to be informed of the specific subject of the inquiry in order that he might judge which questions were pertinent. He was told by the committee chairman only that the general subjects of inquiry were (1) the tax status of, and contributions to, racial organizations, (2) the effect of integration on or its threats to public schools and the general welfare of the state, and (3) the violation of champerty, barratry and maintenance statutes, and that several of the subjects "primarily do not deal with you." Thereafter he refused to answer numerous questions, for which he was cited to appear in state circuit court to show cause why he should not be compelled to answer, and was subsequently convicted for failure to obey the order to answer. The Virginia Supreme Court of Appeals affirmed the conviction. On certiorari, the United States Supreme Court reversed and remanded because the record showed "unmistakable cloudiness" in the committee chairman's statements as to what was sought from the subpoenaed party and why it was sought, and because the state circuit court also failed to explain what the committee wanted and how the questions put related to its desires. The court concluded that petitioner "was therefore not given a fair opportunity, at the peril of contempt, to determine whether he was within his rights in refusing to answer and consequently his conviction must fall under the procedural requirements of the Fourteenth Amendment."

Opinion of the Court by Mr. Justice BLACK, announced by Mr. Justice HARLAN.

David H. Scull was convicted of contempt in the Circuit Court of Arlington County, Virginia, for refusing to obey a decision of that court ordering him to answer a number of questions put to him by a Legislative Investigative Committee of the Virginia General Assembly. On appeal the Virginia Supreme Court of Appeals affirmed without opinion. Scull contended at the Committee hearings, in the courts below, and in this Court that the Virginia statute authorizing the investigation, both on its face and as applied,

violated the Fourteenth Amendment to the United States Constitution. He claimed, among other things, that: (1) the Committee was "established and given investigative authority, as part of a legislative program of 'massive resistance' to the United States Constitution and the Supreme Court's desegregation decisions, in order to harass, vilify, and publicly embarrass members of the NAACP and others who are attempting to secure integrated public schooling in Virginia." (2) The questions asked him

violated his rights of free speech, assembly and petition by constituting an unjustified restraint upon his associations with others in "legal and laudable political and humanitarian causes." (3) "The information sought from [him] was neither intended to, nor could reasonably be expected to, assist the Legislature in any proper legislative function."

["Cloudiness" in Testimony]

Despite his requests, repeated at every stage of the proceedings, the Committee failed to inform him "in what respect its questions were pertinent to the subject under inquiry * * *." We granted certiorari to consider these constitutional challenges to the validity of petitioner's contempt conviction. 357 U.S. 903, 78 S.Ct. 1148, 2 L.Ed. 2d 1154. After careful consideration, we find it unnecessary to pass on any of these constitutional questions except the last one because we think the record discloses an unmistakable cloudiness in the testimony of the Committee Chairman as to what was sought of Scull, as well as why it was sought. Scull was therefore not given a fair opportunity, at the peril of contempt, to determine whether he was within his rights in refusing to answer and consequently his conviction must fall under the procedural requirements of the Fourteenth Amendment.

Scull is a printer and calendar publisher in Annandale, Virginia, where he has been a long-time resident active in religious, civic and welfare groups. Soon after this Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, holding segregation in the public schools to be unconstitutional, Scull began to advocate compliance with the requirements of the *Brown* case. In December of 1954, Scull and a group of other citizens met at a church in Alexandria to consider and discuss "the part which concerned and conscientious citizens can best play in helping to achieve the community adjustments necessary to protect the educational and constitutional rights of all citizens and recently defined and interpreted by the Supreme Court of the United States." The group decided to prepare and publish through a "Citizens Clearing House On Public Education" information about the Virginia educational program and to report on the progress made by various Parent-Teacher Associations in Northern Virginia in developing programs for "orderly integration."

[Newsletter Republished]

One of the newsletters published by the Clearing House was obtained by the Fairfax Citizens' Council, a group which vigorously opposed any desegregation of Virginia schools. The Council republished a large part of the letter in a pamphlet entitled "The Shocking Truth!" It called attention to the fact that the newsletter was being "disseminated through Box 218, Annandale, Va. (David Scull)," and stated that "communications with the N.A.A.C.P., Southern Regional Council Clearing House, B'nai B'rith, Council on Human Relations, American Friends and many other pro-integration groups are funneled through Box 218, Annandale, Va., and membership is encouraged if not actually suggested by the P. T. A. Federation."

The pamphlet came to the attention of Delegate James M. Thomson, Chairman of the Virginia Committee on Law Reform and Racial Activities, who promptly subpoenaed Scull to appear and testify. This group, commonly called the "Thomson Committee," was established a few months after the Virginia General Assembly adopted a resolution attacking the *Brown* decision and pledging that the Legislature would take all constitutionally available measures to resist desegregation in the public schools.¹ The bill setting up the "Thomson Committee" was one of a series of Acts relating to segregation passed on the same day. Among these were bills establishing a pupil-assignment plan, providing for the withdrawal of state funds from integrated schools and forbidding barratry, champerty and maintenance.² While the Acts did not mention the NAACP by name, Chairman Thomson testified below that in the course of the "legislative battle" over them he had stated that with "this set of bills * * * we can bust that organization * * * wide open."

[Appears Before Committee]

Scull appeared before the Thomson Committee, as ordered. He answered several questions about his publishing business, and then was asked whether he belonged "to an organization known as The Fairfax County Council on Human Relations." He replied that "on advice of counsel I wish to state that the language of the subpoena delivered to me was so broad and vague * * * that before going further I wish to ask you to

1. See Va.Acts 1956, S.J.Res. 3.

2. See generally, Va.Acts, E.S.1956, cc. 31-37, 56-71.

tell me the specific subject of your inquiry today, so that I may judge which of your questions are pertinent." Chairman Thomson told him that the general subjects under inquiry were "threefold": (1) the tax status of racial organizations and of contributions to them; (2) the effect of integration or its threat on the public schools of Virginia and on the State's general welfare; and (3) the violation of certain statutes against "champerty, barratry, and maintenance, or the unauthorized practice of law."³ He told Scull, however, that several of these subjects "primarily do not deal with you." Scull then filed a statement of his objections to the questioning and emphasized that he had not been "properly informed of the subject of inquiry." Without clarifying Chairman Thomson's ambiguous statement or specifying which of the "several" subjects did not apply to Scull, the Committee proceeded to ask the 31 questions listed in the footnote below.⁴

3. The Committee was authorized to: "make a thorough investigation of the activities of corporations, organizations, associations and other like groups which seek to influence, encourage or promote litigation relating to racial activities in this State. The Committee shall conduct its investigation so as to collect evidence and information which shall be necessary or useful in

"(1) determining the need, or lack of need, for legislation which would assist in the investigation of such organizations, corporations and associations relative to the State income tax laws;

"(2) determining the need, or lack of need, for legislation redefining the taxable status of such corporations, associations, organizations and other groups, as above referred to, and further defining the status of donations to such organizations or corporations from a taxation standpoint; and

"(3) determining the effect which integration or the threat of integration could have on the operation of the public schools in the State or the general welfare of the State and whether the laws of barratry, champerty and maintenance are being violated in connection therewith." Va. Acts, E.S. 1956, c. 37.

4. "(1) Are you a member of The Fairfax County Council on Human Relations?"

"(2) Are you a member of the National Association for the Advancement of Colored People?"

"(3) Have you contributed to any of the suits, contributed financially to any of the suits designed to bring about racial integration in the public schools?"

"(4) Have you paid court costs in any of the suits designed to bring about racial integration in the State of Virginia?"

"(5) Have you paid attorneys' fees to any attorneys in regard to racial litigation involved in the integration of the public schools in Virginia?"

"(6) Have you attended any meetings at which the formulation of suits against the State of Virginia in racial integration suits in the public schools have been discussed?"

"(7) I notice in your statement that you say that you think you have a moral duty to counsel with a fellow citizen as to his legal rights if he is ignorant

It is difficult to see how some of these questions have any relationship to the subjects the Committee was authorized to investigate, or how Scull could possibly discover any such relationship from the Chairman's statement.⁵ It does

of them. Do you feel qualified to counsel with him as to his legal rights?"

"(8) Who else uses that box number [No. 218 Annandale, Va.] besides yourself?"

"(9) Does the Fairfax County Council on Human Relations use that box?"

"(10) Has the NAACP used that number from time to time?"

"(11) Has the organization known as the Citizens Clearing House used that box number?"

"(12) Has the Fairfax County Federation of PTA's used that number?"

"(13) Has the Fairfax County Federation of P-TA Workshops on Supreme Court Decisions on the Public Schools used that box number?"

"(14) Has Miss Caroline H. Planck or Mrs. Barbara Marx used that box number?"

"(15) Do you know Mrs. Planck or Mrs. Marx?"

"(16) Has Dr. E. B. Henderson used that box number?"

"(17) Has the National Conference of Christians and Jews used that box number?"

"(18) Has the Save Our Schools Committee of Fairfax County used that box number?"

"(19) Has Mr. Warren D. Quenstedt used that box?"

"(20) Has Mr. E. A. Prichard used that number?"

"(21) Has the American Civil Liberties Union used that same box number?"

"(22) Has the Americans For Democratic Action, known as ADA, used that box number?"

"(23) Has the Japanese-American Citizens League used that box number?"

"(24) Has the Washington Inter-Racial Workshop used that same number?"

"(25) Has the American Friends Service Committee used that box number?"

"(26) Does the Community Council for Social Progress use the same box number?"

"(27) Does B'nai Brith use that same box number?"

"(28) Does the Communist Party use that box number?"

"(29) Do you belong to any racial organization, and by 'racial' I mean organizations whose membership is interracial in character or organizations that are instituting or fostering racial litigation?"

"(30) Have you ever been called as a witness before any Congressional Committee?"

"(31) Has your name ever been cited by any Congressional Committee as being on any list of members of any organizations that are cited as subversive?"

5. Question 28 asked if the Communist Party used Box 218; Question 30 asked if Scull had ever been called as a witness before a Congressional Committee; Question 31 asked if his name had ever been cited by any Congressional Committee as being on any list of members of any organizations that are cited as subversive. Nothing in the language of the Act authorizing the Committee or in the statement of Chairman Thomson about the subjects under inquiry could lead Scull to think that it was the Committee's duty to investigate Communist or subversive activities.

seem that several of the questions asked were aimed at connecting Scull with barratry or champerty, but it was never made wholly clear to Scull, either before or after the questioning, that this was one of the subjects under inquiry as far as he was concerned. Nevertheless, Scull was cited to appear before the Circuit Court to show cause why he should not be compelled to answer.

[Statements Explained]

In the Circuit Court the Chairman sought to explain his ambiguous statements about the scope of the investigation. Far from clarifying the matter, however, his testimony added to the confusion, since he successively ruled out as inapplicable to Scull each of the subjects which the Legislature had authorized the Committee to investigate. On first being asked which of the three subjects applied to Scull, he testified:

"For my personal standpoint, I would say that the one dealing with the taxable status does not affect him here, and likewise the one—I have forgotten whether I stated it or not, but I would think that the integration or the threat of integration on public school systems, on the general welfare, would apply.

"Looking at it in retrospect, the other on champerty, barratry, and maintenance would not apply. I don't recall whether I did say or did not say. We did specifically with the third one: champerty, barratry, and maintenance."

Later the following colloquy took place:

"[Counsel for Scull] Q. Now, is it also correct that you said several which primarily do not deal with you?

"[Chairman Thomson] A. If the transcript says it there, I said it.

"Q. Which of those three were you referring to when you said, 'Several which primarily do not deal with you'?

"A. I think it is the last mentioned there. [The last mentioned was barratry.]

"Q. Would you just state for the record so that it is clear on the record which ones you were referring to that did not deal with Mr. Scull?

"A. The violation of those statutes dealing with champerty, barratry, and maintenance, and general unauthorized practice of the law.

"Q. Those did not deal with Mr. Scull?

"A. No, on; I think in the connection that we are dealing with here, that the ones spoken of first did not apply; only the latter one did apply that I was making.

"Q. Now I am confused."

Subsequently, Chairman Thomson stated that barratry applied to a certain "section of the testimony" but did not identify which section. Still later he undertook to specify the section but instead of doing so he made what may have been a general retraction and said, "The whole statement would be applicable to the entire transcript and the fact that he was advised of each one of them would be applicable to the entire transcript."

The judge who ordered Scull to answer the questions made no clearer statement of their pertinence to the investigation or to basic state interests than had the Committee Chairman. His holding was merely that "the questions are of a preliminary nature and in developing the inquiry to secure the information which the Committee is after appears to the Court to be perfectly proper line of inquiry." He at no time analyzed the individual questions asked, nor explained to Scull what it was that the Committee wanted from him and how the questions put to him related to these desires.

[Vital Public Importance]

The events leading to Scull's subpoena, as well as the questions asked him, make it unmistakably clear that the Committee's investigation touched an area of speech, press, and association of vital public importance.⁶ In *N.A.A. C.P. v. State of Alabama*, 357 U.S. 449, 460-466, 78 S.Ct. 1163, 1170-1173, 2 L.Ed.2d 1488, this Court held that such areas of individual liberty cannot be invaded unless a compelling state interest is clearly shown.⁷ But we do not reach

6. See *N.A.A.C.P. v. State of Alabama*, 357 U.S. 449, 460-466, 78 S.Ct. 1163, 1170-1173; *United States v. Rumely*, 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770. Among the questions asked were several dealing directly with political activity. Question 19, for example asked if Mr. Warren D. Quenstedt, a candidate for Congress had used Scull's post office box.

7. Four members of this Court adhere to the view they expressed in *Sweezy v. State of New Hampshire*, 354 U.S. 234, 251, 77 S.Ct. 1203, 1212, 1 L.Ed.2d 1311, and cannot "now conceive of any circumstances wherein a state interest would justify infringement of rights in these fields."

that question because the record shows that the purposes of the inquiry, as announced by the Chairman, were so unclear, in fact conflicting, that Scull did not have an opportunity of understanding the basis for the questions or any justification on the part of the Committee for seeking the information he refused to give. See *Watkins v. United States*, 354 U.S. 178, 208-209, 214-215, 77 S.Ct. 1173, 1189-1190, 1193, 1 L.Ed. 2d 1273. To sustain his conviction for contempt under these circumstances would be to send him to jail for a crime he could not with reasonable certainty know he was committing. This Court has often held that fundamental fairness requires that such reasonable certainty exist. See *Lanzetta v. State of New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888; *Jordan v. De George*, 341 U.S. 223, 230, 71 S.Ct. 703, 707, 95

L.Ed. 886; *Watkins v. United States*, 354 U.S. 178, 208-209, 214-215, 217, 77 S.Ct. 1173, 1189-1190, 1193, 1194; *Flaxer v. United States*, 358 U.S. 147, 151, 79 S.Ct. 191, 193, 3 L.Ed.2d 183. Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for fear of violating an unclear law. *Winters v. People of State of New York*, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840. Such is plainly the case here. The information given to Scull was far too wavering, confused and cloudy to sustain his conviction.

The case is reversed and remanded to the Virginia Supreme Court of Appeals for further proceedings not inconsistent with this opinion.

Reversed.

MISCELLANEOUS ORDERS

The United States Supreme Court:

Affirmed on appeal:

State Athletic Commission v. Dorsey (Prior decision 168 F.Supp. 149, 3 Race Rel. L. Rep. 1232 [E. D. La. 1958] holding Louisiana statutory and administrative prohibitions against "mixed" athletic contests violative of the equal protection clause of the Fourteenth Amendment and rejecting contention that suit for declaratory judgment to that effect and for injunction against state Athletic Commission was contrary to Eleventh Amendment). No. 787, May 25, 1959, 79 S.Ct. 1137, order: "PER CURIAM. The motion to affirm is granted and the judgment is affirmed." *Rehearing denied*, June 29, 1959, 79 S.Ct. 1446.

Petition for rehearing denied:

Bristol v. Heaton (Prior decision 79 S.Ct. 802, 4 Race Rel. L. Rep. 12 [1959] in which the United States Supreme Court denied an appeal, treated as a petition for certiorari, leaving in effect a Texas Court of Civil Appeals decision that denial of admission to female applicants to all-male state college was not a denial of the equal protection and privileges and immunities clauses of the United States Constitution). No. 581 Misc., May 18, 1959, 79 S.Ct. 1123, order: "The petition for rehearing is denied. Mr. Justice DOUGLAS is of the opinion that a rehearing should be granted." Another decision: 4 Race Rel. L. Rep. 412, *infra*, (1958).

St. Regis Tribe of Mohawk Indians v. State of New York (Prior decision 79 S.Ct. 586, 4 Race Rel. L. Rep. 13 [1959] in which the United States Supreme Court denied certiorari, leaving in effect a New York Court of Appeals decision affirming a dismissal of a money claim by an Indian tribe for land appropriated by the state for a power project, holding that the tribe had previously surrendered claim for money payment and has no present due process rights to payment for bare occupancy and that the Federal Indian Intercourse Act does not apply to the state). No. 613, June 1, 1959, 79 S.Ct. 1146, order: "Motion for leave to file petition

for rehearing is denied." Other decisions: 4 Misc.2d 110, 158 N.Y.S.2d 540 (1956); 5 A.D.2d 117, 168 N.Y.S.2d 894 (1957); 4 Race Rel. L. Rep. 343, *infra*, (1958).

Tuscarora Nation of Indians v. Power Authority of the State of New York (Prior decision 79 S.Ct. 66, 3 Race Rel. L. Rep. 1132 [1958] in which the United States Supreme Court denied certiorari, leaving in effect judgment of the Court of Appeals for the Second Circuit that Congress' authorization to take Indian land for a power project could be inferred from the project's size and proximity to Indian reservation, but that Congress' agent the New York Power Authority must exercise such authority only as Congress prescribed—i.e., through judicial proceedings). No. 384, June 22, 1959, 79 S.Ct. 1431, order: "The motion to substitute John Burch McMorran in the place of John W. Johnson as a party respondent is granted. The motion for leave to file a petition for rehearing is denied. Mr. Justice Stewart took no part in the consideration or decision of this motion and application." Other decisions: 3 Race Rel. L. Rep. 715, 1021, 1122 (1958); 4 Race Rel. L. Rep. 252, 344, *infra*, (1959).

Granted certiorari (i.e., agreed to review) and reversed judgment:

National Association for the Advancement of Colored People v. State of Alabama ex rel. Patterson (Prior decision 109 So.2d 138, 4 Race Rel. L. Rep. 347, *infra* [Ala. Supreme Court, 1959] affirming again, except as to membership lists, a judgment of contempt by an Alabama state court against the NAACP for refusing to obey a court order to produce "certain books, papers and documents" described in the order. The case had been remanded by the United States Supreme Court which had held on certiorari that the NAACP could constitutionally refuse to produce its membership lists). No. 753, June 8, 1959, 79 S.Ct. 1001. On the stated assumption that the mandate in this case would be complied with by the state Supreme Court, the court simultaneously denied an application by the NAACP for a writ of mandamus in a companion case. *National Association for the Advancement of Colored People v. Livingston*, No. 674 Misc. 8, 1959, 79 S.Ct. 1001. Other decisions: 1 Race Rel. L. Rep. 707, 917, 919 (1956); 2 Race Rel. L. Rep. 177 (1957); 3 Race Rel. L. Rep. 611 (1958).

Granted certiorari (i.e., agreed to review):

Bates v. City of Little Rock (Prior decision 319 S.W.2d 37, 4 Race Rel. L. Rep. 136 [Ark. Supreme Court, 1958] affirming the constitutionality of ordinances requiring organizations, upon demand, to furnish to cities wherein they operate the names of contributors and dues payers for purposes of aiding in determination of eligibility for statutory tax immunity as charitable or non-profit organizations). No. 770, May 18, 1959, 79 S.Ct. 1118.

Federal Power Commission v. Tuscarora Indian Nation; New York Power Authority v. Tuscarora Indian Nation (Prior decision 265 F.2d 338, 4 Race Rel. L. Rep. 344, *infra*, [D.C. Cir. 1959], after the FPC had issued a license to the New York Power Authority to permit construction of a reservoir within an Indian reservation, remanding case to the FPC for determination required by the Federal Power Act that the license would not "interfere or be inconsistent with the purpose for which such reservation was created or acquired," and upon subsequent report by the FPC that such finding could not be made, remanding case again to the FPC with instructions to amend licensing order so as to exclude the Authority's power to condemn the Indians' land). Nos. 911, 921, June 22, 1959, 27 L.W. 3362, order: "The petitions for writs of certiorari are granted. The cases are consolidated and a total of two hours allowed for oral argument." Other decisions: 3 Race Rel. 715, 1021, 1122, 1132 (1958); 4 Race Rel. L. Rep. 252, *supra*, (1959).

Denied certiorari (i.e., declined to review):

Bullock v. United States; Kasper v. United States (Prior decision 265 F.2d 683, 4 Race Rel. L. Rep. 285, *infra* [6th Cir. 1959] affirming a district court judgment of conviction for criminal contempt of court for violating an order of the district court issued in a case [McSwain v.

County Board of Education of Anderson County, Tennessee, 138 F.Supp. 570, 1 Race Rel. L. Rep. 317] requiring the discontinuance of racial segregation in a Clinton, Tennessee, high school, and overruling contentions of denial of constitutional rights to freedom of speech and a fair trial). No. 868, June 15, 1959, S.Ct. 1294; No. 966, June 29, 1959, 79 S.Ct. 1452. Other decisions: 1 Race Rel. L. Rep. 872, 1045 (1956); 2 Race Rel. L. Rep. 26, 317, 792, 795 (1957).

Eaton et al. v. Board of Managers of the James Walker Memorial Hospital et al. (Prior decision 261 F.2d 521, 4 Race Rel. L. Rep. 131 [4th Cir. 1958] affirming, for lack of federal jurisdiction in the absence of state action, a dismissal of a suit by Negro doctors seeking admission to practice in a privately operated hospital). No. 789, May 4, 1959, 79 S.Ct. 941, order: "Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. May 4, 1959. Denied. The CHIEF JUSTICE, Mr. Justice DOUGLAS, and Mr. Justice BRENNAN are of the opinion that certiorari should be granted." Another decision: 3 Race Rel. L. Rep. 1006 (1958).

Gibson v. Florida Legislative Investigation Committee (Prior decision 108 So.2d 729, 4 Race Rel. L. Rep. 143 [Fla. Supreme Court, 1958] upholding a lower court order to witnesses [alleged officials and members of the Miami Branch of the NAACP] subpoenaed by the Florida Legislative Investigation Committee [see 3 Race Rel. L. Rep. 784 (1958)] in an investigation of the Communist Party and the extent of its infiltration into groups in specified fields of activity, requiring them to answer questions pertinent to the inquiry and to produce NAACP records for certain limited uses). No. 873, June 22, 1959, 79 S.Ct. 1433, order: "The petition for writ of certiorari is denied. The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas are of the opinion that certiorari should be granted." See also *In re Petition of Graham*, 104 So.2d 16, 3 Race Rel. L. Rep. 724 (Fla. 1958).

Jenkins v. Louisiana (Prior decision 236 La. 256, 107 So.2d 632, 4 Race Rel. L. Rep. 177 [La. Supreme Court, 1958] holding that in the criminal prosecution of a Negro charged with the murder of a white man the trial court did not err in overruling a motion to quash the indictment, the grand jury panel, the grand jury, and the petit jury venire when the evidence did not sustain allegations that the grand jury and petit jury venire had been illegally drawn nor that Negroes had been systematically excluded from the grand jury. No. 787, Misc., May 18, 1959, 79 S.Ct. 1135.

Jones and Cardwell v. People of the State of California (Prior decision 256 F.2d 576, 3 Race Rel. L. Rep. 1034 [9th Cir. 1957] denying as a petition for a writ of habeas corpus a document, submitted by California state prisoners convicted on narcotic charges, praying for "immediate action to insure the rights of petitioners' indigent circumstances, to show that the laws are for all the nobly born, the well connected and those of grosser clay, in the instant action persons of a different race than the majority of the community," the court holding that inquiry cannot be made by habeas corpus into the validity of an indictment except when no crime is charged therein). No. 578 Misc., April 6, 1959, 79 S.Ct. 801. Other decisions: 153 Cal. App.2d 377, 314 P.2d 484 (1957); 155 Cal. App.2d 149, 317 P.2d 108 (1957).

National Association for the Advancement of Colored People v. State of Arkansas ex rel. Bennett (Prior decision 319 S.W.2d 33, 4 Race Rel. L. Rep. 142 [Ark. Supreme Court, 1958] affirming a holding that a report of total donations from state citizens during previous years to the NAACP, rather than lists of individual contributors, was not privileged under free speech and press guarantees). No. 772, June 15, 1959, 79 S.Ct. 1293.

National Association for the Advancement of Colored People et al. v. Williams (Prior decision 98 Ga. App. 74, 104 S.E.2d 923, 3 Race Rel. L. Rep. 980 [Ga. Court of Appeals, 1958] holding that, where the certificate of the trial judge that the bill of exceptions was true and specified all the evidence and record material was contradicted by his other certificate only conditionally approving the brief of evidence, the Georgia Court of Appeals lacked jurisdiction of NAACP's appeal from trial court's order adjudging it in contempt for disobeying order to produce records for state income tax purposes). No. 783, June 1, 1959, 27 79 S.Ct. 947, order:

"Per Curiam. The motion to substitute Dixon Oxford in the place of T. V. Williams as the party respondent is granted. The State represents to us that no fine against petitioner has been finally determined and assessed. Accordingly, the petition for a writ of certiorari is denied, leaving petitioner free to take further proceedings here when the judgment below becomes final or the jurisdiction of this Court may otherwise be appropriately invoked."

Mr. Justice Douglas filed a separate opinion: "With some doubts I bow to the conclusion that this judgment is not final within the meaning of the jurisdictional statute, 28 U.S.C. § 1257. It ordered the petitioner to 'produce all its books, records and other data bearing on said corporation's income, disbursements and expenses prepared or used by said corporation in the conduct of its business during said taxable years wherever said business was transacted, whether within or without this state (except such as may be otherwise theretofore produced hereunder) * * * within thirty-five days * * * [and] that said corporation forthwith pay into the registry of the Clerk of this Court a fine of twenty-five thousand dollars, to be hereafter assessed and apportioned remedially and punitively, as shall appear just and appropriate to the Court, the Court reserving jurisdiction, after the production of the books, records and data hereby ordered, to reduce the amount of said fine if such should be just under the circumstances then existing.'

"By the terms of this judgment, the Georgia court reserves the power to reduce the amount of the fine. One question tendered by the petitioner would turn on the amount of the fine. It is the issue of 'cruel and unusual punishments' which is outlawed by the Eighth Amendment that is in turn made applicable to the States by the Fourteenth, *Francis v. Resweber*, 329 U.S. 459, 433. That is a subsidiary question and one that the State contends is not properly here because, it is said, no such assignment of error was included in the bill of exceptions.

"The central issue in the case has nothing to do with the amount of the fine. It seems that the order to produce the records and the citation for contempt followed each other in a matter of a few hours. The basic question is whether holding petitioner in contempt and imposing any fine comported with that due process required of every government under our Bill of Rights. Were that question here alone, I would think the judgment was final. But since the issue of 'cruel and unusual punishment' is also tendered and since a reduction of the fine may eliminate it from the case, I acquiesce in the denial of certiorari at this stage of the proceedings." Other decisions: 2 Race Rel. L. Rep. 181 (1956); 3 Race Rel. L. Rep. 312 (1957); 4 Race Rel. L. Rep. 351, *infra*, (1958).

Seneca Nation of Indians v. Brucker et al. (Prior decision 262 F.2d 27, 4 Race Rel. L. Rep. 136 [D.C. Cir. 1958] affirming a district court dismissal of a complaint by Indian nation seeking an injunction to restrain United States Army officials from constructing a reservoir project that would flood Indian lands, it being determined that Congress had sufficiently clearly authorized the taking of such lands by eminent domain). No. 860, June 15, 1959, 79 S.Ct. 1294. Another decision: 162 F.Supp. 580 (D. D. C. 1958).

Whitfield et al. v. United Steelworkers of America, Local No. 2708 et al. (Prior decision 283 F.2d 546, 4 Race Rel. L. Rep. 122 [5th Cir. 1959] affirming a district court decision that a collective bargaining agreement setting up separate lines of progression for skilled and unskilled job promotions is not racially discriminatory, although the agreement recognized the rights of "white" incumbents in the skilled lines which had accumulated under previous racially discriminatory employment practices). No. 874, June 8, 1959, 79 S.Ct. 1285. Another decision: 3 Race Rel. L. Rep. 55 (1957).

Judgment vacated:

National Association for the Advancement of Colored People v. Bruce Bennett, Attorney General of the State of Arkansas (Prior decision 4 Race Rel. L. Rep. 349, *infra* [E.D. Ark. 1959] holding, in NAACP suit to restrain enforcement of state barratry statute and statute authorizing county judges to compel production of membership lists of organizations engaged in activities

designed to interfere with state control of schools, that federal court should not pass on statutes' constitutionality, even if obviously unconstitutional, until efforts to obtain adjudication in state courts have been exhausted). No. 757 June, 22, 1959, 79 S.Ct. 1192, order: "Per Curiam. When the validity of a state statute, challenged under the United States Constitution, is properly for adjudication before a United States District Court, reference to the state courts of construction of the statute should not automatically be made. The judgment is vacated and the case is remanded to the United States District Court for the Eastern District of Arkansas for consideration in light of *Harrison v. NAACP*, 359 U.S._____, 79 S.Ct. 1025. Judgment vacated and case remanded."

"Mr. Justice DOUGLAS, with whom The CHIEF JUSTICE and Mr. Justice BRENNAN concurs, dissenting:

"While I agree that the case should be remanded to the District Court, I think that court should be directed to pass on the constitutional issues presented without prior reference to the state courts. My reasons are stated in my dissent in *Harrison v. NAACP*, 359 U. S._____, 79 S.Ct. 1025."

Cases docketed:

Ginsburg v. Stern (Prior decision 263 F.2d 457, 4 Race Rel. L. Rep. 309, *infra* [3rd Cir. 1959] affirming a district court denial of a motion to vacate an order dismissing a complaint charging Justices of the Pennsylvania Supreme Court with conspiring to deprive plaintiff of constitutional rights embodied in the federal Civil Rights Act through alleged improper interpretation of state law and procedure in deciding unfavorably to plaintiff certain other cases in which he had been a party, because defendants were immune to liability for official acts). No. 1003, June 13, 1959, 27 L.W. 3362. Other decisions: 148 F.Supp. 663 (W.D. Pa. 1956); 3 Race Rel. L. Rep. 486 (1958); 356 U. S. 932 (1958); 356 U.S. 954 (1958); 357 U.S. 924 (1958).

Harpole v. United States ex rel. Goldsby (Prior decision 263 F.2d 71, 4 Race Rel. Rep. 377, *infra*, [5th Cir. 1959] reversing a district court decision that a Negro convicted of murder had waived objection to systematic exclusion of Negroes from the petit jury, and holding that defendant was legally detained under indictment as he waived objection to the grand jury and therefore was not presently entitled to discharge under habeas corpus but that if he had not been retired within eight months before a jury from which Negroes have not been systematically excluded petition for habeas corpus would again be considered). No. 997, June 12, 1959, 27 L.W. 3357. Other decisions: 78 So.2d 762 (Miss. 1955); 350 U.S. 925 (1955); 1 Race Rel. L. Rep. 565 (1956); 352 U.S. 944 (1957); 3 Race Rel. L. Rep. 66 (1957).

Holt v. Raleigh City Board of Education (Prior decision 265 F.2d 95, 4 Race Rel. L. Rep. 281, *infra* [4th Cir. 1959] affirming dismissal of a Negro boy's suit for declaration of right to attend a "white" public school and for injunctive relief, because of failure to exhaust administrative remedies through refusing to appear at a hearing provided for by statute, although invited, to answer questions concerning his application for reassignment). No. 999, June 12, 1959, 27 L.W. 3362. Another decision: 3 Race Rel. L. Rep. 917 (1958).

Other orders:

United States v. Raines et al. (Prior decision 172 F.Supp. 552, Race Rel. L. Rep. 314, *infra* [M.D. Ga. 1959] in a suit by the Attorney General of the United States for preventive relief against county voter registrars allegedly depriving, while acting in their official capacity, certain persons of voting right because of race or color, holding Section 1971 (c) of Title 42 as amended by the 1957 Civil Rights Act unconstitutional for authorizing the Attorney General to seek an injunction against a private citizen for private action). No. 914, June 29, 1959, 79 S.Ct. 1448, "Further consideration of the question of jurisdiction is postponed to the hearing of the case on its merits. The case is transferred to the summary calendar."

County School Board of Prince Edward County, Virginia v. Allen et al. (Prior decision 266 F.2d 507, 4 Race Rel. L. Rep. 297, *infra* [4th Cir. 1959] reversing a district court decision which fixed 1965 as the deadline for compliance by the Prince Edward County, Virginia, School Board with desegregation orders, and directing the district court to order the Board to consider Negro children's applications for admission to the "white" high school so as to permit entrance in September, 1959, and to make plans for desegregating elementary schools "at the earliest practical day"). No._____, June 26, 1959, 79 S.Ct. 1443, order: "The application for a stay of further proceedings in the United States District Court for the Eastern District of Virginia is denied." Other decisions: 1 Race Rel. L. Rep. 5 (1954); 1 Race Rel. L. Rep. 82 (1955); 1 Race Rel. L. Rep. 1055 (1956); 2 Race Rel. L. Rep. 341 (1957); 3 Race Rel. L. Rep. 964 (1958).

COURTS

EDUCATION

Public Schools—Delaware

Brenda EVANS, et al. v. Madeline BUCHANAN, et al.

United States District Court, District of Delaware, April 24, 1959, Civil Actions Nos. 1816-1822, inclusive.

SUMMARY: Eight class actions were filed in federal district court in Delaware by Negro school children, against members of the State Board of Education and various county and local school officials, seeking admission to public schools without discrimination on the basis of race or color. A motion to dismiss the action because of failure to allege administrative impediments to desegregation was denied. 145 F.Supp. 873, 2 Race Rel. L. Rep. 7 (1956). Summary judgment was subsequently granted to plaintiffs, the court directing the local and state boards to present plans for integration, 149 F.Supp. 376, 2 Race Rel. L. Rep. 301 (1957), and the state officials to admit the children to specific named schools on a non-discriminatory basis. 2 Race Rel. L. Rep. 781 (1957). These decrees were affirmed, against the contention of the state board that the power to plan and effect desegregation was in the local school boards, which were beyond the authority of the state board to control. 256 F.2d 688, 3 Race Rel. L. Rep. 901 (3d Cir. 1958). The state board then submitted to the district court a plan providing for grade-by-grade desegregation over a twelve-year period, beginning with all first grades at the fall term, 1959. After a hearing, the court concluded that it would be infeasible to integrate at once all, or a large segment, of the system in view of the magnitude of stress upon the education process that an operation of that scope would entail in overcrowding facilities, increasing costs of construction and operation, downgrading academic standards, and exciting traditional racial prejudices. In admitting evidence on the last point over plaintiff's objection that such was irrelevant under the "Little Rock Case" [*Cooper v. Aaron*, 78 S.Ct. 1401, 3 Race Rel. L. Rep. 855 (1958)], the court distinguished that case on the ground that the question here was not whether there shall be no integration because of fear of a hostile community, but merely what is the most sensible way of carrying integration into effect in the face of likely public resistance. And the court concluded that evidence tending to show that public interest was better served by a gradual plan possibly averting violent setbacks to the cause of education was relevant in determining the reasonableness of the plan. With minor modifications, the plan was approved.

LAYTON, District Judge.

The chronological legal background of these cases is fully set out in *Evans v. Buchanan*, et al., 152 F.Supp. 886 (D.C. Del., July 15, 1957) and *Evans v. Buchanan*, et al., 256 F.2d 688 (C.A. 3rd, July 23, 1958).

It is sufficient here to say that on May 17, 1954, the Supreme Court of the United States declared that racial discrimination in the public school systems was unconstitutional, *Brown v. Board of Education of Topeka*, 347 U.S. 483,

and on May 31, 1955, by a supplemental opinion, 349 U.S. 294, announced that the primary responsibility for solving the many local problems which would inevitably arise from integration must rest upon the local school boards so long as they acted in good faith.

[Case History Reviewed]

In the cases before me, a group of Negro children, through their guardians, brought class actions for injunctions in this Court to require

their admission to the public schools of Delaware on a racially nondiscriminatory basis. The State School Board defended upon the ground that many local boards had refused to follow its directives as to integration and that it was powerless to enforce them upon what it conceived to be autonomous bodies. Judge Leahy granted summary judgment against the defendants holding that the defendant, State Board, had complete authority over the actions of the local boards and directing the former to file a plan of desegregation on a state-wide basis within a stated time. The Third Circuit Court of Appeals affirmed. The time for the filing of the plan having expired pending the appeal, a supplemental order was entered on November 19, 1958, which, together with minor amendments thereto, directed that the State Board of Education submit a plan of desegregation with this Court within 112 days, and setting a hearing thereon on Tuesday, March 17, 1959.¹

[Delaware Desegregation Plan]

A plan has now been prepared and submitted in accordance with the requirements of the order. In simple terms, it provides for desegregation of the Delaware Public School System on a grade by grade basis over a period of twelve years beginning with all first grades at the Fall term, 1959. A three day hearing was held upon the plan followed by the filing of briefs and oral argument.

In its first opinion in *Brown v. Topeka*, briefly mentioned above, the Supreme Court stated that:

"... the plaintiffs ... are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

And in its second opinion it was held that:

"... School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles ..."

"... Traditionally, equity has been characterized by a practical flexibility in

1. The order provided for the submission of a tentative plan to the local boards to be followed by further discussion and, thereafter, the preparation and submission of a final plan.

shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner * * *.

"... Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems * * *."

[Gradual Desegregation Permissible]

The plan of the State Board is the only one before me for consideration. Neither the plaintiffs nor any other interested party have offered an alternative. The plaintiffs apparently take the position that they are under no duty to offer a plan—rather, that it is the burden of the State Board to prepare a plan which, in all respects, must meet the requirements of the *Brown* cases. With this I agree. But to the extent that the plaintiffs at times seem to contend that no plan other than one calling for total desegregation is contemplated by the *Brown* decisions, I disagree. The language of the two opinions plainly permits a more gradual transition if the circumstances require.

Conditions which, if fairly found to exist, would call for something less than full and im-

mediate desegregation are (1) the problem of additional buildings or classrooms and teaching personnel in a given locality due to an increase in enrollment; (2) the difficulties attending the reshuffling of the extensive school transportation system because of the relocation of students in different schools; (3) the closing of some schools entirely and the merging of others into more convenient districts together with the drafting, presentation and passage of legislation without which certain of these objectives cannot be satisfactorily solved; (4) the financial burden occasioned by new buildings and additional personnel which will fall in part upon local taxpayers and in part upon the State; (5) the problem of meshing substantial numbers of Negroes into a hitherto all white school system where the educational achievement level of the former is significantly lower than that of the latter and (6) the impact of integration upon a predominantly Southern society.² The plaintiffs have objected to this latter consideration as irrelevant. I do not agree. My reasons will appear fully hereafter.

[Total, Immediate Integration Not Feasible]

Before considering the plan itself, it is appropriate to state that, in my judgment, any thought of a total and immediate integration of the Delaware School System is out of the question. I agree fully with the testimony of the witnesses in this respect.

The question may then well be asked why

2. The two lower Counties, Kent and Sussex, are bounded by Maryland on the South and West, New Castle County on the North and the Delaware River, Bay and Atlantic Ocean to the East. This area lies opposite Washington and Northern Virginia. Historically, it held to the Union during the Civil War but, nevertheless, approximately 1550 slaves then existed in the Southern Counties. It is almost exclusively an agricultural area and with the exception of Dover, Milford and Seaford, the population of no town exceeds three thousand. It is populated with numerous farms, small and large, and with villages and small towns, the latter of which derive most of their income from agriculture and its derivatives. In its manners, customs and thinking, this area is noticeably Southern in character. Segregation exists in nearly all aspects of its social life. While white and colored not infrequently work side by side, a rigid segregation exists in the schools, churches and to only a slightly lesser extent in restaurants. In the motion picture theaters, the colored sit in one side or another of the balconies. There are separate parent-teacher associations connected with the schools, and segregation exists in such organizations as Kiwanis, American Legion and the like. Separate bathing is generally recognized at bathing beaches. As said in *American Mercury*,

consideration should not be given to the immediate desegregation of some large segment of the System, such as the elementary or secondary grades.³ In this connection, it can be fairly said that the present high school situation in the lower Counties is particularly open to criticism insofar as concerns segregation because in Sussex County, for instance, there is but one colored high school located in Georgetown in the central part of the County with the result that large numbers of colored students daily are transported by bus long distances (up to 25 miles) to school only to have to face the same long return trip at the day's end. And, in so doing, many of them may pass a white high school close to their own homes. Even so, there are convincing reasons why total desegregation of the high schools should not be attempted now. From testimony of Dr. Miller, supplemented by an exhibit introduced by the State Board, it is possible to present a fair picture of some of the problems which arise as the result of such a plan.

Overcrowding is clearly indicated, but that is only one of the problems. Overcrowding creates the need for additional rooms, additional teaching personnel and additional facilities of many other sorts. While only a few estimates are given,⁴ the increased cost for the construction and operations budgets would obviously be very substantial. The cost of the former would fall on an unwilling citizenry and of the latter on a state rapidly approaching a bad financial crisis.

Moreover, aptitude tests are in evidence indicating that the academic achievement levels of the Negro are significantly lower⁵ than those

July-Dec. 1950, "There are two Delawares separated from each other by an imaginary extension of Mason & Dixon's line. In Delaware, the line is without political significance but this is the one place where it perceptibly separates North from South. Northern Delaware is urban, industrial and hilly. Southern Delaware is rural, agricultural and flat as a bowling alley. The farmers of Southern Delaware are as Dixie-oriented as their neighbors on the Eastern Shore of Maryland; . . ."

3. Generally speaking, the Delaware Schools are divided into the elementary grades, 1-6, and the secondary grades, 7-12, of which grades 7 and 8 are classified as Junior High School.
4. New construction at Caesar Rodney would cost \$240,000 and Millsboro in excess of \$150,000.
5. It is worth noting that while Dr. Clark, plaintiffs' expert psychiatrist, was able to demonstrate that the defendants' exhibit tending to show that the Negro children had a substantially lower I.Q. than the white was of little significance, yet he failed to mention the achievements tests.

High Schools Including Junior High

	Present White	Additional Negroes	Per Cent Increase	Can Handle More
Caesar Rodney	877	85	10% (very crowded now)	No
Smyrna	544	134	25%	No
Milford	853	163	18% (very crowded now)	No
Harrington	333	37	9%	Yes
Dover	995	252	25% (crowded now)	No
Seaford	812	194	25% (crowded)	No
Rehoboth	227	33	7%	Yes
Lewes	393	103	26%	No
Laurel	629	151	26%	No
Georgetown	483	126	25%	Possible
Millsboro	306	128	42%	No
Shelbyville	250	80	32%	No

of white students of corresponding age. To force integration at the high school level would pose yet another serious problem, i.e., at the expense of the white students to downgrade existing academic standards to a level capable of being met by the average Negro or to maintain existing standards which, through no fault of their own, many of the Negroes could not presently meet.

[Emotional Strains on System]

Finally, but not of least importance, is the emotional strain upon the whole educational system as the result of an immediate desegregation of any substantial segment of the school system, such as the high schools, in a predominantly Southern society. This may come about through forces operating both from within and without the school system. By the high school age, prejudice has unfortunately had ample time to take root. These prejudices will inevitably make themselves felt in the classrooms. As an example of how similar tensions may be stirred up from without, we have the testimony of Dr. Madden, the Superintendent of the Seaford Schools, who stated:

"That is right, sir. We had one meeting [held by Bryant Bowles] near our district, and the following day there seemed to be a vicious rumor circulated that the Seaford

Board of Education has accepted colored students into the school. We had parents coming to the school that day and taking their children out of school. We had children roaming the halls, leaving classrooms at will with utter disregard for teacher control or discipline, without regard to anything I had to say, the principal of the school, and then even to the point of having a representative group of people come into the school and roam the school at will until I called them into my office to ask what the disturbance was, and confronted with this statement that they understood there were colored students admitted to the school. I asked them to produce any evidence. They, of course, could do nothing but say that this was hearsay evidence, and the group then decided to leave, after convincing themselves apparently that there were no colored students admitted. But for the next several days after this the general excitement and the turmoil was such that administrative control was very difficult."

[Immediate Integration of 6 Grades Rejected]

The same considerations above discussed preclude any thought of an immediate integration of the first six elementary grades. Again, from Defendants' Exhibit 4, it is possible to demonstrate the result in a few, selected situations:

	Additional Negroes	Approximate Per Cent Increase	Approximate Cost of New Building
Houston	48 (grades 1-8)	39%	\$60,000.
Kenton	49	52%	\$60,000.
Bridgeville	261	over 70%	Probably nearly \$200,000.
Ellendale	79	62%	\$60,000.
Millsboro	264	over 65%	Probably over \$250,000.
Selbyville	155	60%	Over \$200,000.

As can be seen from this study, many more students, teachers and facilities would be involved than at the high school level. The difference between the academic achievement potentials of the two races, while less pronounced, would begin to appear at the fifth and sixth grade age and the resentment of the community would be equally strong.

Even the thought of desegregating immediately some portion of the elementary grades presents definite problems, although obviously of a much lesser degree. The variation in the achievement potentials between the two races is not too significant at the third grade level, for instance, nor does racial prejudice usually exist at that early stage. Nevertheless, Dr. Simpson, Superintendent of the Caesar Rodney School testified that " * * * to add students from the Star Hill (colored) School would certainly overcrowd the facilities that are already overcrowded." And judging from Defendants' Exhibit 4, if the first three grades were now desegregated, the enrollment of Kenton School #9 would be increased 26%, Ellendale over 25%, Millsboro about 33% and Bridgeville as much as 35%.⁶ Again, examples may be multiplied.

[Integration of Three Grades Possible]

Even so, I suppose it would be possible to integrate the first three grades immediately. Statistics may be variously interpreted. The point is debatable. The State Board does not feel so. It has an advisory staff composed of experts in the field. They know the problems involved both from the point of view of education, administration and finance. Many of these gentlemen, Dr. Madden, Superintendent of the Seaford Schools, for example, come from areas wholly free from racial prejudice. To a man they agree that any plan calling for integration

on any wider scale than the one here proposed would be a mistake. Under such facts, for me to substitute my judgment for theirs would not only offend familiar legal principles but would, in effect, infer lack of good faith on the part of the State Board of Education.

[Bad Faith Not Present]

Bad faith has been charged. To the contrary, the State Board acted with considerable courage in attempting to take over the operation of the Milford Schools under a plan of integration put into effect immediately after the announcement of the first decision in *Brown v. Topeka*. The deep and lasting animosities, threats of violence and damage to school morale occasioned by that unfortunate incident, to the embarrassment of us all, have become a matter of record in the public press throughout the entire country. Ultimate responsibility is a heavy burden as only those who have had it can appreciate. Knowing what has happened not only in Delaware but elsewhere, and understanding the temper of the Southern Counties, the Board in the best of faith, I am certain, devised a plan, which in its judgment would both get desegregation under way at once and, at the same time, create the least possible opposition. Under such circumstances, any imputation of bad faith must be rejected.

[Effects on Southern Society Admissible]

What has just been said not only raises an important aspect of the integration question which should be met head-on but also illustrates my reason for overruling the plaintiffs' objections to the admission of evidence as to the effect of desegregation upon a predominantly Southern society.

The plaintiffs protested strenuously against the admission of such evidence upon the ground that it is wholly irrelevant to the issue here and cited

6. Approximate figures arrived at by dividing in half certain of the estimated increased enrollments taken from Defendants' Exhibit D.

the following language from *Cooper v. Aaron*, 78 S.Ct. 1401, the so-called "Little Rock case", in justification of their position:

"The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. * * * Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights."

Read in its proper context, no one would presume to disagree. Here, however, we are faced, not with the question of whether there shall be integration at all, but with deciding the most sensible way of carrying out what is already an accomplished fact. Theoretically, a Court should be very slow to uphold or to reject a plan of desegregation based upon fear, and fear alone, of its effect upon a hostile community. Thus, the threat of desegregation on a wide scale in a section where racial prejudices exist may cause neighbors to cease speaking, threats of violence, mass meetings of protest and misguided individuals disguised in sheets to burn crosses on people's lawns. Standing alone, this might be said to be a regrettable community problem quite irrelevant to a consideration of whether or not a given plan of integration is reasonable. The difficulty is, that as a practical matter, such demonstrations can never stand alone. Inevitably, they overflow into the classroom and then we have a Little Rock, a massive resistance movement or another Milford incident. As a result, the schools are filled with emotional stresses and strains, some classes are suspended indefinitely, while others limp along in an atmosphere of tension and hostility seriously interfering with the process of learning. Violence and open disrespect for law and order flourish on the school grounds and who is the loser? The students, both Negro and white, or in other words, the cause of education, which is so vital to the free world today that the Supreme Court of the United States in *Brown v. Topeka*, 347 U.S. 483 (1954) said this:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our demo-

cratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

[Graduality in Public Interest]

Surely, the public interest would be better served by a gradual plan which would go a long way toward eliminating the possibility of another setback to the cause of education in Delaware such as the Milford⁷ incident. And a frank recognition of this fact should certainly be a relevant factor in determining whether or not a given plan is reasonable and practicable.

The community feeling is relevant in another fashion also. It has been testified to that before total integration is completed, it will become necessary to re-divide the State schools into a more orderly system of districts. Who will do this? The legislature, a majority of whom are from the Southern Counties and who, being human, will vote for a piece of legislation only if it pleases them. New classrooms and buildings will be needed in the near future costing many hundreds of thousands of dollars. Where will this money come from? As pointed out earlier, it must be raised by means of a local referendum wherein the citizens bind themselves to higher taxes. This Court has wide powers but among them is not the power to compel taxpayers from a predominantly Southern society to vote substantial additional taxes upon themselves for a proposition so unwelcome as desegregation.

[Public Support Needed]

All this demonstrates very plainly that unless the public is in back of the plan, the cause of

7. Following the first opinion in *Brown v. Topeka*, the Milford School Board attempted an immediate plan of desegregation. The community instantly rebelled. Mass meetings, Ku Klux Klan demonstrations and other threats of violence occurred under the leadership of one Bryant Bowles. The schools were closed down completely for some time.

education will suffer in the long run. A more convincing reminder of this fact could scarcely be imagined than the testimony of James M. Rosbrow who appeared as a witness in this case. It deserves to be quoted, but the testimony might lose some of its weight if it were not first stated that Mr. Rosbrow is a scholarly, articulate and public-spirited citizen, vitally interested in the cause of education. A Jew, he is utterly impatient with segregation in any form and as a member of the New Castle School Board, in 1954, he led his Board in pushing through a plan of integration even before the mandate of the Supreme Court in *Brown v. Topeka* was handed down. Yet, as President of the Delaware Congress of Parents and Teachers, he has, of necessity, traveled widely throughout the lower part of the State and become familiar with local problems and local feelings. A portion of his testimony follows:

"... in terms of my own knowledge and in terms of the people with whom I have talked, in terms of the meetings I have attended and the very careful, soul-searching I have done, I believe that the plan proposed by the State Board is a sound workable plan for Delaware and Kent and Sussex Counties. I believe it is the type of plan that will rally to its support the decent-thinking people of Kent and Sussex Counties. I think it is of tremendous importance that a matter of this grave impact to the community shall have community support. I say again, sir, that in all sincerity I wish it were possible, and I wish I thought it were feasible, that a twelve-grade plan should work forthwith. This I believe in. But on the other hand I don't want to see another Milford incident if anything I can do can help that. I don't want to see another Bryant Bowles given hospitality in the State of Delaware. I feel that this great wrong which has continued so long can better be remedied in such manner as to have true community acceptance by being allowed to go forward on a gradual basis."

[Summary of Considerations]

To summarize, a careful consideration of all the material factors involved in effecting an orderly desegregation of the school system convinces me that any plan calling for the immediate desegregation of all the State schools or

of any large segment of the system, such as the high schools, or the first six grades, would be wholly unfeasible. Reasonable minds may differ on the question of whether a plan calling for the immediate integration of the first three grades would be justified. However, there is unrefuted testimony from experts that it would not, and on top of this there is the almost certain knowledge that any kind of severe plan would be bitterly resented with unfortunate consequences to the whole school system. Under such circumstances, for a Court to attempt to substitute its judgment for that of the State Board of Education would amount to an unwarranted abuse of judicial discretion.

[Plan Modified]

The plan will be approved with the exception of two paragraphs which in my opinion should be eliminated.

Paragraph 4 of the plan says this:

"Whenever possible, every pupil in the grades affected, beginning with the start of the fall term, 1959, and in additional grades as the program expands in succeeding years shall have the choice of (a) attending the nearest school within the district in which he resides or (b) attending the school he would have attended prior to the effective date of this order."

Now, it is a fact that in Georgetown, for example, the majority of the Negroes live in a community known as The Hill. The colored school is close by. The white school is at a much greater distance. Interpreting the language of paragraph 4 in the light of these facts, it would seem to result that no Negro student whose family resides on The Hill may ever enter the white school. Whatever may have been the reasons for this provision, it strikes me as unfair and is ordered to be stricken.

Paragraph 5 of the plan, in effect, provides that no white student intending to enter the first grade of school at this Fall term need register but that all Negro children must do so. No one seems to remember just how or why this paragraph crept into the plan. I am sure that it was not intended to be discriminatory but it savors of discrimination and should be eliminated.

Finally, there remain for disposition the argu-

ments advanced by the Milton Special School District No. 8 and the Caesar Rodney Special District that the plan should be amended to the extent that where, in the judgment of a local school board, the integration of the first grade this year, or of any grade hereafter, would cause unnecessarily crowded conditions, then the grade need not be desegregated until the needed

facilities are provided. The short answer to this is that the power to delay, resting in unfriendly hands, is tantamount to the power to defer indefinitely or to defeat altogether. This request must be rejected.

An order will be entered directing that an amended plan be submitted within 30 days in accordance with this opinion.

EDUCATION

Public Schools—New York

In the Matters of Charlene SKIPWITH, Sheldon Rector, children twelve years of age.

Domestic Relations Court of City of New York, Children's Court Division, New York County, December 15, 1958, 180 N.Y.S.2d 852.

SUMMARY: New York City Negro parents who refused to send children either to specified public junior high schools attended only by Negroes and Puerto Ricans, to which they had been assigned by the Board of Education, or to private schools meeting required standards, were charged in a municipal domestic relations court with child neglect. The parents alleged that since the specified schools were *de facto* racially segregated and staffed with inferior teachers, children attending them were denied educational opportunities equal to those afforded in city schools whose pupil population is largely white, in violation of the Equal Protection Clause of the United States Constitution. The court determined *de facto* segregation to exist but found the cause to be residential segregation not attributable to governmental action. However, the court also found a substantially lower percentage of regularly licensed teachers in the predominantly colored junior high schools than in predominantly white schools. Although it was found that this discriminatory pattern resulted from voluntary decisions of regularly licensed teachers, the court held that, assignment of teachers being a governmental function, the Fourteenth Amendment had been violated by the Board's failure to compel licensed teachers to take posts where needed to establish equal educational opportunities. The court concluded that no neglect was indicated, since the parents have a constitutionally guaranteed right to elect no education for their children rather than to subject them to discriminatorily inferior education, and are in fact providing them with private non-approved instruction.

POLIER, Justice.

On October 28, 1958, Stanley and Bernice Skipwith were cited as respondents in a petition filed by the Board of Education charging them with neglect of their daughter, Charlene, a twelve-year old girl. The petition alleged that the child was without proper guardianship in that her parents, "refuse to send the child to Junior High School 136 or private school meeting the requirements of the Board of Education law."

The 33 days of absence between September 8,

1958, and October 27, 1958, were stipulated to be correct by both sides, and the respondents did not offer substitute private schooling as a defense.

On October 29, 1958, Sheldon and Shirley Rector were likewise cited as respondents in regard to their son, Charles, a twelve-year old boy who had failed to attend Junior High School 139. Here, too, by stipulation of counsel for the respondents that the reasons of the parents for refusing to send their son to Junior High School 139 were identical with those given by the parents of Charlene Skipwith. It was stipulated

that should the Court, over the objection of counsel for the Board of Education, consider the evidence submitted concerning the alleged inferiority of the school to which the Skipwith child had been assigned, the record in the Skipwith case should be regarded and treated as if testified to in the Rector case, and that the two cases should be consolidated, since the issues presented were identical.

The parents frankly acknowledge that they have refused to send their children to Junior High Schools 136 and 139, and do not claim either the physical or mental inability of their children to attend school as a reason for nonattendance. They do not offer evidence of substitute teaching in compliance with the law as a defense, although they have in fact arranged for some private tutoring of their children.

[Educational Inferiority Alleged]

The parents assert, in justification of their refusal to send their children to these two schools, that both schools offer educationally inferior opportunities as compared to the opportunities offered in schools of this city whose pupil population is largely white. This inferiority of educational opportunities, they assert, results from two conditions which they allege exist in these schools and for the existence of which conditions they claim the Board of Education is responsible. One of the alleged conditions is *de facto* racial segregation in these two schools all of whose pupils are either Negro or Puerto Rican. The other alleged condition is the discriminatory teacher staffing of these two schools with personnel having inferior qualifications to those possessed by teachers in junior high schools in New York City, whose pupil population is largely white.

As a consequence of the situation alleged to exist in these two schools, it is claimed that the children attending them are denied equal educational opportunities in violation of the "equal protection of the laws" guaranteed by the Fourteenth Amendment to the Constitution of the United States. Additionally, it is urged that for this Court to compel these parents to send their children to schools offering such unequal educational opportunities would be a further violation of equal protection of the laws.

The Board of Education contends that these constitutional objections are not properly before this Court but must be addressed to the Com-

missioner of Education under Section 310 of the Education Law. In the view of the Board of Education, the only defense open to the respondents before this Court is that absence of the children from attending school is due to illness or that the parent has made provision of education elsewhere, which meets the requirements of the Education Law.

These proceedings are based upon subdivision (17), Section 2 and subdivision 1, Section 61 of the Domestic Relations Court Act of The City of New York. The latter section gives the Court exclusive jurisdiction to hear all cases involving children under the age of sixteen years who are alleged to be "neglected". Section 2 provides that "Neglected child means a child under sixteen years of age . . . who is unlawfully kept out of school."

[Court's Powers]

If this Court adjudicates a child to be neglected, Section 83 of the Domestic Relations Court Act provides that the judgment of this Court may:

"(b) . . . Place the child . . . under supervision to remain in his own home or in the custody of a relative or other fit person, subject, however, . . . to the further orders of the court;

"(c) Commit the child to the care and custody of a suitable institution maintained by the state or any subdivision thereof, or to the care and custody of a duly authorized association, agency, society or institution . . . ;

"(f) Render such other and further judg-

1. Section 3205 of the Education Law provides, "In each school district of the state each minor from seven to sixteen years of age shall attend upon full time day instruction."

The parents' responsibility for seeing that this instruction is provided is found in Section 3212, paragraph b of subdivision 2 which provides that the parent,

"Shall cause such minor to attend upon instruction as hereinbefore required, and to comply with the provisions of part one of this article with respect to the employment or occupation of minors in any business or service whatever."

Paragraph d of subdivision 2 of said section further provides that the parent,

"Shall furnish proof that a minor who is not attending upon instruction at a public or parochial school in the city or district where the person in parental relation resides is attending upon required instruction elsewhere. Failure to furnish such proof shall be presumptive evidence that the minor is not attending."

ment or make such other order or commitment as the court may be authorized by law to make." * * *

This broad grant of powers was further enlarged by the addition of subdivision (i) to Section 83 by Chapter 949 of the Laws of 1956. This provides that, upon an adjudication of neglect, the Court may, if it appears that the conduct of the parents "has contributed" to such neglect, "issue a written order specifying conduct to be followed by such parent * * * with respect to such child." The only guide provided by subdivision (i) for such order is that "The conduct specified shall be such as would reasonably prevent * * * neglect as defined by statute." Subdivision (i) further provides that "Such order shall remain in effect for a period of not more than one year to be specified by the court and said order may be extended or renewed by the court." Sanctions of the most drastic character are specified to assure compliance with such an order. Thus, subdivision (i) of Section 83 concludes with the following provisions:

"Willful violation of any provision of such order shall constitute criminal contempt out of presence of the court. The persons so charged shall be notified of the accusation and have a reasonable time to make a defense. The trial of such proceeding shall take place before a judge other than the one who issued the written order. Punishment for such contempt may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. When a person is committed to jail for non-payment of such fine, he shall be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days shall be computed from the expiration of the definite time."

If these children are adjudicated neglected because of their parents' refusal to send them to the schools in question, and their parents thereafter persist in such refusal, the appropriate action by this Court might well be to issue a written order specifying that the children be sent to these schools. If such an order were disobeyed, these parents would be subject to a heavy fine or imprisonment, or both.

Subdivision (i) provides that:

"The judge before issuing any such order shall advise such parent, guardian or other person of his right to have the reasonableness immediately reviewed, and in this connection the supreme court is vested with jurisdiction to summarily determine the reasonableness or any question of law or fact relating to such written specifications and make such order as justice may require."^{1a}

It would seem, however, that this review would be of no avail to these parents since an order requiring them to send their children to these schools would clearly be such as would be reasonably necessary to prevent the repetition of the very same neglect originally committed. Moreover, the review provided in subdivision (i) of Section 83 would be entirely unavailable if this Court were to commit these children to an institution in order to assure their attendance at a public school or a school which meets the requirements of the Board of Education.

[Board's Contentions]

In sum, the Board of Education urges that these children may be taken from their families by this Court, and their parents may be fined and imprisoned for refusing to send them to public schools which, it is charged, are conducted in violation of the Constitution of the United States, and that this Court has no power to consider such charge.

In other words, the Board of Education contends that one arm of the State—this Court—must blindly enforce the unconstitutional denial of constitutional rights by another arm of the State—the Board of Education. Such a proposition is abhorrent to the American doctrine of supremacy of the law. It is utterly shocking to the conscience of a Justice of a Children's Court established to promote the health and welfare of children. Only the clearest of legislative mandates or the plainest of judicial precedents would compel this Court to such a holding. None do so. The holdings of the Courts of this State are to the exactly opposite effect, and the decisions of the Supreme Court of the United States are clear that any other holding would itself

1a. Chapter 324 of the Laws of 1957 omitted the prior provision for review, in the alternative, by the County Court and the Court of General Sessions.

deny the due process of law also guaranteed by the Fourteenth Amendment.

[Cases Cited]

The cases cited by the Board of Education do not support its argument that this Court has no power to consider the defenses on constitutional grounds offered by these parents. Indeed, none of them involved constitutional issues. Moreover, other cases decided by the courts of this State hold, again and again, that not only constitutional rights, but statutory and even common law rights, may be vindicated as against boards of education without prior resort to the Commissioner of Education.

People v. Himmanen, 108 Misc. 275, 178 N.Y.S. 282, 283, cited by the Board of Education, involved a criminal prosecution against a parent for failure to send his children to school. He defended on the ground that distance from his home was so great and the roads so bad that it was unreasonable to require him to send his children to school after the school bus service was discontinued. A jury in the magistrate's court found against the parent on the facts and he appealed to the County Court on the ground of errors in the admission of evidence. The County Court ruled that any errors in evidential rulings were immaterial because, in its view, the only defense under the Education Law was that the children were "not in proper physical and mental condition to attend school."

People v. Himmanen, did not give any consideration to whether an appeal to the Commissioner of Education was the appropriate remedy for the parent. Nor was the point considered in a similar case decided by the Children's Court, Nassau County, *In re Conlin*, 130 N.Y.S.2d 811, also relied upon by the Board of Education.²

2. The Conlin case was a criminal prosecution pursuant to Section 3227 of the Education Law. The Children's Courts outside of New York City and the counties of Cortland and Westchester have jurisdiction in such cases under subdivision 7 of Section 6 of the Children's Court Act of the State of New York. The Children's Courts in New York City and the counties of Cortland and Westchester have jurisdiction under Section 3227 of the Education Law. Section 3228 of the Education Law provides that a violation by a parent of the duty to provide required education, "• • • shall be punishable for the first offense by a fine not exceeding ten dollars, or ten days' imprisonment; for each subsequent offense by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment."

In *Matter of Myers*, 203 Misc. 549, 119 N.Y.S.2d 98, this Court declined to rule upon the defense offered in a neglect proceeding that the school to which a child had been originally assigned was hazardous for the child to attend because of unsanitary conditions. In the *Myers* case, the charge of neglect was dismissed since it was affirmatively shown that the child was receiving the required amount of instruction at home prescribed by her grade and, further, that the Board of Education had offered to transfer the child to attend a school in an adjoining district against which the parents had no objection except on the grounds of personal preference for still another school. It was not urged before me in the *Myers* case that this Court could not consider the parents' objection because they had not sought review by the Commissioner of Education.

Matter of Richards, 166 Misc. 359, 2 N.Y.S.2d 608, affirmed 255 App. Div. 922, 7 N.Y.S.2d 722, 723, the Board of Education urges went off on the point that non-attendance of the child was excused for health reasons. However, I do not so read the decision of the Appellate Division affirming the order of the Children's Court which dismissed a neglect petition brought by a truant officer. The unanimous *per curiam* opinion was as follows:

"Appeal from an order of the Chenango County Children's Court, which dismissed proceedings brought by the Truant Officer of the town of Oxford. The petition asked that the mother of a child eight years of age be punished for failing to send the child to school. It was one and a quarter miles from the home of the defendant to the place where the school bus passed. The road was lonely, poorly cared for, unfenced. The judge of the children's court found as a fact that it was not unreasonable to refuse to permit this child, of a tender age, to walk this distance along a lonely and poorly kept road. The mother taught the child at home, which she was competent to do.

"The order of the Children's Court should be affirmed.

"Order unanimously affirmed, with costs and disbursements of this appeal."

It is significant, I believe, that the Appellate Division chose not to rest its affirmance solely upon the ground that the mother of the child was providing adequate education at home.

De Lease v. Nolan, 185 App.Div. 82, 172 N.Y.S. 552, cited by the Board of Education, has no possible bearing upon the authority of this Court to consider the defense offered in this case. That case involved a civil suit for trespass brought against an attendance officer who had entered a home to arrest a truant, without a warrant, under the authority of what was then Section 633 and is now 3213 of the Education Law. No excuse for the child's non-attendance was offered other than that it was with his mother's consent. Manifestly, the case had nothing to do with the necessity for an appeal to the Commissioner of Education and no reference is made in the opinion of the Appellate Division to any such point.

Matter of Weberman, 198 Misc. 1055, 100 N.Y.S.2d 60, affirmed *Auster v. Weberman*, 278 App.Div. 656, 102 N.Y.S.2d 418, affirmed 302 N.Y.855, 100 N.E.2d 47, involved a habeas corpus proceeding instituted by the mother against her former husband to obtain custody of their son on the ground that the father was sending the boy to a religious school which did not meet the requirements of the Education Law. The father defended on the ground that to sustain the writ would be to violate his religious freedom in violation of the First and Fourteenth Amendments to the Constitution. The defense was considered and overruled on the merits. Nowhere in the opinion of the Court is there any reference to the necessity of resort to an appeal to the Commissioner of Education.

Although not cited by the Board of Education, a case even more closely in point (though adverse to the position of the Board) is *People on Complaint of Shapiro v. Dorin*, 199 Misc. 643, 99 N.Y.S.2d 830, affirmed *People v. Donner* 278 App.Div. 705, 103 N.Y.S.2d 757, affirmed 302 N.Y. 857, 100 N.E.2d 48, appeal dismissed *Donner v. People on Complaint of Silverman*, 342 U.S. 884, 72 S.Ct. 178, 96 L.Ed. 663. The Dorin case involved a prosecution in this Court for failure to send a boy to a qualified school.³ The father defended on the ground that to compel him to remove the child from a religious school would violate his constitutional rights, even though the religious school did not meet the educational standards specified by the Education Law. Here again, as in *Matter of Weberman*, the defense was considered and overruled on the merits.

3. The prosecution was under Section 3227 of the Education Law. See footnote 2 *supra*.

It would unduly lengthen this opinion to cite all the instances in which the Board of Education has sought, without success, to persuade the courts of this State that a person aggrieved by its conduct must seek the remedy of an appeal to the Commissioner of Education. Illustrative cases are *Frankle v. Board of Education of City of New York*, 173 Misc. 1050, 19 N.Y.S.2d 588, modified and affirmed 259 App.Div. 1006, 21 N.Y.S.2d 511, affirmed 285 N.Y. 541, 32 N.E.2d 830 (failure to make mandatory appointments of eligible teachers to fill vacancies); *Davis v. Board of Education of City of New York*, 263 App.Div. 369, 33 N.Y.S.2d 311, modified and affirmed 288 N.Y. 330, 43 N.E.2d 67 (same); *Sokolove v. Board of Education of City of New York*, 176 Misc. 1016, 29 N.Y.S.2d 581 (same); *Jacobson v. Board of Education of City of New York*, 177 Misc. 809, 31 N.Y.S.2d 725, modified and affirmed 265 App.Div. 837, 37 N.Y.S.2d 647, appeal denied 265 App.Div. 935, 39 N.Y.S.2d 416; *Cottrell v. Board of Education of City of New York*, 181 Misc. 645, 42 N.Y.S.2d 472, affirmed 267 App.Div. 817, 47 N.Y.S.2d 106, affirmed 293 N.Y. 792, 59 N.E.2d 32 (reduction of teachers' salaries fixed by schedules filed with Commissioner of Education).

While the cases cited in the preceding paragraph involved teachers rather than pupils (and their parents), it goes without saying that the courts of this state are open equally to both in order to establish and defend their legal rights. What is significant in those cases obviously is not the personality of the aggrieved person, but rather it is that the rights vindicated were statutory in origin (i. e., based on the Education Law) or rested upon the civil service provisions (Article 5, Section 6) of the Constitution of New York. These, of course, are lower in the hierarchy of values than the fundamental rights guaranteed by the Fourteenth Amendment.

[Other Cases Considered]

One other case involving an action by a teacher deserves special mention. In *Moses v. Board of Education of City of Syracuse*, 127 Misc. 477, 217 N.Y.S. 265, affirmed 218 App.Div. 811, 218 N.Y.S. 827, reversed on other grounds 245 N.Y. 106, 156 N.E. 631, a woman teacher brought an action for mandamus to set aside salary schedules on the ground that they discriminated in favor of male teachers in violation

of the then recent amendment to the Education Law. Both the Supreme Court and the Appellate Division rejected the contention that the teacher's sole remedy was an appeal to the Commissioner of Education. The Court of Appeals reversed on the ground that the teacher failed to establish the alleged discrimination. The Court, which included such judicial statesmen as Cardozo, Pound and Lehman, would hardly have passed over without mention the claim of exclusive administrative remedy, if the assertion had even merited consideration.

Nor has the protection of direct judicial review of acts of boards of education been afforded only to those in the teaching role.

Thus, in *Cannon v. Tower*, 188 Misc. 955, 70 N.Y.S.2d 303, 309, it was held that an action would lie to restrain the Board of Education of the City of Albany from revoking a permit to use the public school building for a musical concert by Paul Robeson. Special Term, after holding that while the granting of the license was a discretionary act, ruled that no such discretion existed so far as revocation of the license was concerned. Moreover, the Court said, the provision of the Education Law for an appeal to the Commissioner of Education "is permissive and not mandatory" and "it is not the exclusive remedy of an aggrieved person."

Even more pertinent to the present case is *Ellis v. Dixon*, Sup., 118 N.Y.S.2d 815, 818, affirmed on other grounds 281 App.Div. 987, 120 N.Y.S.2d 854, 855. In that case, a proceeding was brought under Article 78 of the Civil Practice Act for an order directing the Board of Education of the City of Yonkers to permit the Yonkers Committee for Peace to use a school house in the City of Yonkers. Special Term ruled that, "Where, as here, the denial of permission to use a school house involved the exercise of a discretionary power by the respondent—Board of Education, it is the opinion of this court that an appeal to the Commissioner of Education is the exclusive remedy of petitioner." On appeal, the Appellate division affirmed on the merits but expressly overruled the jurisdictional objection which Special Term had sustained. Said the Appellate Division, "The proceeding was properly before the court. However, the petition does not allege facts which establish a clear legal right to the relief sought nor which establish that respondents failed to perform a duty enjoined by law."

In sum, the New York Courts hold that Sec-

tion 310 of the Education Law is no bar to a judicial determination of whether a board of education has violated legal rights, whatever their origin, and that even where a board of education has acted in the exercise of discretion, the courts are available to determine whether such discretion has been exercised in an illegal manner. No other ruling would be compatible with the principle—that ours is a government of laws and not of men—which is the keystone of our American liberties. Indeed, the Supreme Court of the United States has held that it would be a denial of due process of law if administrative action immediately affecting the liberties of an individual were placed beyond judicial scrutiny when the government sought to punish him for disobedience of such administrative command. See *Estep v. United States*, 327 U.S. 114, 122, 127, 133, 66 S.Ct. 423, 90 L.Ed. 567.

[Virginia Case Considered]

It may be noted that the Supreme Court of Virginia has held that the compulsory education law of that State may not be invoked to punish Negro parents for refusal to send their children to a segregated school. *Dobbins v. Commonwealth*, 198 Va. 697, 96 S.E.2d 154, 157. As the Supreme Court of Virginia said, compulsory education laws "cannot be applied as a coercive means to require a citizen to forego or relinquish his constitutional rights." One must experience regret that the Board of Education of the City of New York should suggest that the courts of this State be less solicitous of the rights of its citizens.

The issue here involved goes even deeper than is made explicit in *Dobbins v. Commonwealth*. It is the Board of Education, and not these parents, who have invoked the power of this Court. This is not a situation in which parents of children seek a court order directing the Board of Education to remedy allegedly unconstitutional education conditions in the schools. Even if such were the case, a court having jurisdiction of such matter might well hold, in the light of the recent decision of the Supreme Court in the Little Rock case, *Cooper v. Aaron*, 78 S.Ct. 1401, 3 L.Ed.2d 5 (September 29, 1958) that in the City of New York "all deliberate speed" in remedying such conditions requires action *instantly*. Here, however, there is not the question of how speedily the Board of

Education should be called upon to end unconstitutional discrimination, if such be found to exist. For here it is the Board of Education which asks that this Court now lend its sanction to the alleged unconstitutional mandate of the Board. This, as the restrictive covenant cases teach, no court may do without violating the Constitution. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586.

[Constitutional Issues Considered]

This Court, I conclude, has the duty to consider upon the merits the constitutional issues presented by these parents in defense of their conduct⁴ and, if the defense is sustained by the facts, this court must dismiss the proceeding against them.

Tables prepared for this hearing by the Board of Education show the following:

The two schools to which the children in these cases were assigned are the only Junior High Schools in the City of New York whose student population is 100% Negro and Puerto Rican. Junior High School 136 has 1,560 (98.4%) Negro children and 25 (1.6%) Puerto Rican children. Junior High School 139 has 1,629 (98.5%) Negro children and 25 (1.5%) Puerto Rican children.

There are seven additional Junior High Schools in New York City in which the student population is over 95% Negro and Puerto Rican. In forty Junior High Schools, the student population is over 95% white, described by the Board of Education as "other" in the tables submitted by it.

Also revealing is the information contained in these tables as to "X" schools and "Y" schools.⁵

4. Accordingly the Court now overrules those objectives made by the Board of Education to admission of evidence on this issue and on which decision was reserved at the hearing.
5. The "X" and "Y" appellations have their origin in the Report of the Public Education Association (1955), prepared at the request of the President of the Board of Education and quoted in the Final Report of the Commission on Integration of the Board of Education.

The Final Report of the Commission on Integration, submitted to the Board of Education on June 13, 1958, states that Colonel Levitt, then President of the Board of Education, requested the Public Education Association "to conduct a full, impartial and objective inquiry into the status of the public education of the Negro and Puerto Rican children in New York City." The P.E.A. accepted the task and enlisted the help of the New York University Research Center for Human Relations. The Commission's Final Report states that the report of the Research Center "provided a frame of reference"

The term X school is used to describe a school with a Negro and Puerto Rican population of 85% or more; and the term Y school is used to designate a school with a Negro and Puerto Rican population of less than 15%. The tables prepared by the Board of Education for this hearing show that, among the 127 Junior High Schools in New York City, there are 16 X schools and 52 Y schools.

From the foregoing, the conclusion must be drawn that *de facto* racial segregation exists in the Junior High Schools of New York City. This confirms what is a matter of common knowledge. What the record in this case does not show is to what extent, if any, such segregation is the consequence of circumstances other than residential segregation not attributable to any governmental action. There is no evidence before the Court that the racial composition of Junior High Schools in New York is the product of gerrymandering of school districts, or of any policy or lack of policy of the Board of Education in establishing school districts, or in choosing school sites, or in assigning pupils to schools on the basis of race. Upon the record in this case, the Court holds that no showing has been made that *de facto* segregation in New York City is the consequence of any misfeasance or non-feasance of the Board of Education. So far as the respondents rest their defense upon that ground, their refusal to send their children to Junior High Schools 136 and 139 is not justified. Compare *Henry v. Godsell*, D.C.Mich., 165 F.Supp. 87; *Holland v. Board of Public Instruction*, 5 Cir., 258 F.2d 730.⁶

[Discriminatory Staffing Alleged]

I turn now to alleged discrimination in the staffing of X schools, with the alleged result that

for the subsequent work of the six sub-commissions of the Board of Education's Commission on Integration whose reports are summarized in the Commission's Final Report.

6. In *Henry v. Godsell*, *de facto* school segregation in Pontiac, Michigan, resulting from the residential pattern of the community, was held not to constitute a denial of equal protection of the laws. However, in *Holland v. Board of Public Instruction*, the opposite conclusion was reached where the school district in Palm Beach County, Florida, in which the child lived was "designated by city ordinance as a Negro residential area." 258 F.2d at page 731. In the latter case the Court of Appeals observed that, "In the light of compulsory residential segregation . . . it is wholly unrealistic to assume that the complete segregation existing in the public schools is either voluntary or the incidental result of valid rules not based on race." 258 F.2d 732.

schools attended predominantly by Negro and Puerto Rican children are taught by less qualified teachers and, hence, enjoy inferior education advantages. Before summarizing the evidence on that point, however, it is important to note that if such is the situation, a terrible injustice is done to children who already have to suffer the blighting effect of segregation.

Preliminary to the adoption on December 23, 1954, of the resolution directing the establishment of the Commission on Integration,⁷ the Board of Education declared that:

"The Supreme Court of the United States (in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873) reminds us that modern psychological knowledge indicates clearly that segregated, racially homogeneous schools damage the personality of minority group children. These schools decrease their motivation and thus impair their ability to learn. White children are also damaged. Public education in a racially homogeneous setting is locally unrealistic and blocks the attainment of the goals of democratic education, whether segregation occurs by law or by fact."

As was said in the Report of the Commission on Integration, submitted June 13, 1958,

"Whether school segregation is the effect of law and custom, as in the South, or has roots in residential segregation, as in New York City, its defects are inherent and incurable. In education there can be no such thing as separate, but equal. Educationally as well as morally and socially, the only remedy for the segregated school is its desegregation."

This declaration was endorsed by Dr. Wayne B. Wrightstone, distinguished educator, psychologist, social scientist, and Director of the Bureau of Research of the Board of Education who was called as a witness by the respondents. On the basis of his own research, Dr. Wrightstone testified that the following were, in his opinion, the major factors which affect the achievement level of students: Inherited characteristics; nutritional and other factors present before and after birth of a child; environmental factors including stimulating academic environmental factors in the home and the community;

aspiration level of the individual and his parents, amount of schooling attained by parents; instruction or teaching. Dr. Wrightstone acknowledged that there was less deviation in IQ tests of children in the X and Y schools before they reached the fourth grade, where verbal content began to be stressed. He also testified that the studies made by his Department showed that there was a widening spread in IQ tests between children in X and Y schools as they proceeded in their respective schools.

Dr. Kenneth B. Clark, another distinguished psychologist, educator and social scientist,⁸ and a member of the Commission of the Board of Education, who also served on the sub-commission on Educational Standards and Curriculum, was called by the respondents as an expert witness. He agreed with Dr. Wrightstone that the way in which a child learns was a complex and subtle problem. However, he placed greater emphasis on the role of the school in the learning process. According to Dr. Clark:

"The most objective observable factor is the learning situation itself, the school, the teachers, the opportunities which children have to learn, the conditions under which they are required to learn, the factors which overtly or subtly influence their motivation
* * * the school plays a very important role in motivating a child to learn."

In answer to the question of whether the composition of the school population would in his opinion have any substantial effect on either the learning process or the motivation to learn Dr. Clark testified:

"It is my considered judgment and opinion, as a consequence of extensive study of segregation in schools, both in those regions of the country where segregated schools were maintained previously by law and in regions of the country where segregation in schools exists as a consequence of residential segregation or mores, that the segregated school and the general characteristics usually found associated with segregated schools depress the ability of children to learn, as reflected in low achieve-

7. See note 5 *supra*.

8. Dr. Clark was cited by the Supreme Court as a "modern authority" on the "detrimental effect upon the colored children [of segregation of white and colored children in public schools]". *Brown v. Board of Education*, 347 U.S. at page 494, footnote 11, 74 S.Ct. at page 692.

ment scores, in low IQ scores, to the extent that these IQ scores are the result of what the child has or has not been taught * *

"I certainly agree with Dr. Wrightstone that the factors and the problems involved in the achievement of a child, or educational achievement of a child, are complex and subtle. I think, among the complex and subtle factors, is the child's estimate of what other people think of him and how he is treated and what is expected of him.

"It is my judgment, from experience, observation and study of the debilitating effect of segregated schools—it is my personal judgment that subtle attitudinal factors may be as important, if not more important, than the more measurable, concrete deficiencies which are usually found associated with segregated schools * * *".

[Segregation Inimical to Equal Education]

The record in this case fully sustains the contention that the separation of children by race, whether it be the result of governmental action or of private housing segregation, creates factors inimical to the full and equal educational opportunities. Further, as pointed out by both Dr. Wrightstone and Dr. Clark, the quality of teaching is still another vital factor in determining the adequacy of education. Indeed, it is a truism that the more the child is disadvantaged by other factors, the greater the need of the child for skillful teaching. Certainly it is fatuous to make declarations regarding the educational handicaps imposed upon a child by being in a segregated school and not to take reasonable measures to assure that such child is given teachers at least equal in qualifications to those not so disadvantaged. Yet such is the case in the public school system of New York.

The Principal of Junior High School 136 was called as a witness by the respondents. The Court was deeply impressed by his sincere devotion to the welfare of the children in his school and by his efforts to secure a staff sufficient in number and adequate in skill. That he failed in his endeavor was, in the opinion of the Court, inevitable in view of the default of the Board of Education.

The following facts were developed through the testimony of the Principal of Junior High School 136. Under the stipulation of the parties,

they will be treated as also applying to Junior High School 139.

Junior High School 136 has 1,560 students. There are 85 teachers, including the guidance counselor, of whom 42 are regularly licensed. The 43 academic vacancies⁹ are filled by substitutes. Substitutes, unlike regularly licensed teachers, are not assigned by the Board of Education, but must be secured by the Principal personally, through advertising, interviews, and other individual efforts.

Of the six teaching positions in the Science Department, three are filled by teachers regularly licensed to teach science by the Board of Education. One is licensed as a substitute social science teacher. Another is a regularly licensed common branch teacher, i. e., a teacher licensed to teach all subjects in the first through sixth grades, but not to teach a specific subject in a Junior High School.

Only two of the 11 teaching positions in the Mathematics Department are filled by teachers regularly licensed to teach mathematics by the Board of Education. One has a regular license to teach business subjects. Two are licensed as substitutes to teach mathematics. Two are licensed as substitutes to teach foreign languages, and two are licensed as substitutes to teach social studies.

In Social Studies, Fine Arts and Foreign Languages Departments, the proportion of regularly licensed teachers is far better.

The Assistant Superintendent in charge of personnel for the Junior High School Division, called as a witness by the respondent, testified to the tremendous dearth of regularly licensed teachers available for Junior High Schools throughout the City. Thirty-four per cent of the teaching positions throughout the Junior High Schools are now listed as vacancies, which means that they are being filled by substitutes. In answer to a question, this witness testified that "There is a shortage of teachers and, particularly, a shortage of teachers in the Junior High Schools, so no matter what we do is spreading poverty." However, the tables which the Board of Education subsequently prepared at the request of the Court shows that the "poverty" is by no means evenly spread among the Junior High Schools of New York City.

On reading the record, the court was satisfied

9. "Academic vacancies" or "vacancies" is the terminology employed to describe authorized positions not filled by regularly licensed teachers.

that in order to reach a conclusion as to whether the assignment of school personnel constituted evidence of substantial discrimination, unequal educational opportunities, and a violation of constitutional rights, fuller evidence on this question was needed. At the request of the court, further evidence was submitted by the Board of Education in the form of tables which included the names and addresses of the 127 Junior High Schools of New York City, the ethnic composition of the student bodies in each such school and, as of September 11, 1958, the number of regularly licensed teachers working in each such school, and the number of academic vacancies as of that date. They also included a list identifying those schools which have been designated by the Board of Education as in need of special services. The Board has requested the court not to publish the identity of those schools listed, lest its publication injuriously affect the children attending them. For the purpose of this opinion, it is sufficient to state that the vast majority of X schools, including Junior High Schools 136 and 139, were included in this group.

[City-Wide Discrimination]

Analysis of the data submitted on teacher assignment shows a city-wide pattern of discrimination against X Junior High Schools (which have 85% or more Negro and Puerto Rican students) as compared to Y schools (which have 85% or more white students): A far greater percentage of positions in the X schools were not filled by regularly licensed teachers.

As I have already noted, positions not filled by regularly licensed teachers, the "academic vacancies", must be filled by substitutes secured through the individual efforts of the principals. The educational requirements for a regularly licensed teacher are substantially higher than for a substitute teacher.¹⁰ Thirty hours of graduate courses are required of regularly licensed teachers of general subjects, but none are required of substitutes. For both teachers of general and special subjects, the number of required hours in approved courses are higher for regularly licensed teachers than for substitutes.

10. See Board of Education By-Laws, Article XII, Secs. 332-332a. Counsel for Board of Education asked that the Court take a judicial notice of the By-Laws, and agreed to submit a copy. The copy received will be deemed marked in evidence as the Court's Exhibit 6 as of December 5, 1958, the last trial day.

[Teacher Vacancies]

As of September 11, 1958, the average percentage of vacancies in the X Schools (over 85% Negro and Puerto Rican students) was 49.5%, while the average percentage of vacancies in the Y Schools (over 85% white students) was 29.6%. In the two schools to which the children of the respondents were assigned, there were over 50% vacancies in one and 51% vacancies in the other. The following is a summary of the present situation:

Vacancies in X and Y Schools ¹¹

Borough	X Schools		Y Schools	
	No. of Schools	%	No. of Schools	%
Manhattan	7	48.8	2	28
Brooklyn	3	55.0	22	31.6
Queens	2	33.0	18	27.8
Bronx	4	55.0	10	29.0
Total	16	49.5	52	29.6

While the Board of Education introduced some evidence tending to show that some steps had been taken to improve the teaching and program at Junior High School 136, no evidence was submitted to show that the Board had adopted any procedure under which correction of the discriminatory imbalance between regularly licensed and substitute teachers could be reasonably anticipated.

The Assistant Superintendent in charge of personnel in the Junior High School Division testified that the Board of Education had given her no power to transfer regularly licensed teachers once appointed. The Principal of Junior High School 136 testified that only one regularly

11. See Appendix for detailed breakdown within each Borough. Data submitted by the Board of Education was incomplete as to seven of the 127 Junior High Schools and they are, therefore, not included in the above table or in the Appendix.

Supplement To Footnote 11

January 12, 1959

The summaries in the Appendices are the result of an analysis of the tables submitted by the Board of Education at the hearing on December 5, 1958. These tables covering all the Junior High Schools of New York City were admitted in evidence as Court's Exhibits 3 and 5.

Exhibit 3 gives the ethnic census of these schools from which the Court derived the percentages of "Negro" and "Puerto Rican" and "Other" pupils in each school.

Exhibit 5 shows the number of regularly licensed teachers and the number of academic vacancies from which the Court derived the percentages of such teachers and vacancies in each school.

licensed teacher had transferred voluntarily to his school. Thus, despite the high percentage of substitutes in the Mathematics Department, and despite an appeal by the principal for more regularly licensed teachers in this field, the disproportionately high percentage of substitutes at Junior High School 136 has remained practically unchanged.

The steps taken to improve the teaching at Junior High School 136 included an allotment for nine new teaching positions this year, of which five were filled by regularly licensed teachers. The size of classes has thus been reduced. The Assistant Superintendent in charge of curriculum testified that a project to improve the reading level of the students is now under way but admitted that thus far only two remedial teachers have been assigned to the school—this, despite the extremely low median reaching achievement of the students and the fact that in the Eighth Grade alone 269 children were characterized as slow learners and had a median reading level of 2½ to 3½ years below par.

[Discrimination Not Eradicated]

The Assistant Superintendent in charge of personnel testified that projected additional services for Junior High School 136, and for those other schools designated as in need of special services, contemplated reduction of class size and improvement of teaching programs.

This Fall, for the first time, the principal introduced a Special Progress Class for gifted children with IQs of 125 or more.¹² But at present this class exists only in the Seventh Grade. But neither these limited ameliorative steps, nor the unquestionable devotion of the principal to improving the educational program of Junior High School 136, touches the core of the problem.

No amount of individual skill or devotion of school principals can compensate for or eradicate the established pattern of discrimination in the

assignment of regularly licensed teachers, which has grown up over the years despite the fact that as long ago as 1896, the Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, though sanctioning segregation, held that the Fourteenth Amendment requires "equal facilities." It should not have required *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, in 1954 to alert the Board of Education of the City of New York to its constitutional responsibilities. At least by 1950, when *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114, was decided by the Supreme Court, there was no excuse for thinking that the Fourteenth Amendment's constitutional command of "equal facilities" in education meant anything less than true equality.

The report of the Commission on Integration itself refers to various elements that cause the quality of education in X schools to be inferior: higher percentages of handicapped and retarded children; relatively larger percentages of substitute teachers; higher proportions of inexperienced teachers, all at those very schools where the social and economic conditions of the area and the problems of the children require a more experienced, stable and capable staff to meet the problems of the children. The evidence submitted shows that the two schools involved in the present case suffer from each of these difficulties to a marked degree.

Moreover, the Report of the Commission on Integration notes that the Sub-Commission on Teachers Assignment and Personnel¹³

"deems it morally indefensible to allow the continuance of the present unequal staffing of our schools * * * (Our) recommendations are concerned with recognizing, first the right of all children to a fair share of experienced teaching; second, the need for a changed assignment policy that recognizes this right * * * third, the right of children, teachers and supervisors to equal conditions for teaching to the extent to which the school system can provide it."¹⁴

12. In 1955, 66.7% of the Y Junior High Schools had special classes for intellectually gifted children, but there were no such classes in the X Junior High Schools of New York City. See, *The Status of the Public School Education of Negro and Puerto Rican children in New York City*, presented to the Board of Education Commission on Integration, October, 1955. Prepared by the Public Education Association assisted by the New York University Research Center for Human Relations, requested by Colonel Arthur Levitt, President of the New York City Board of Education.

13. The report of this Sub-Commission dated December 7, 1956, was submitted to the Board of Education by the Commission on Integration for its approval and laid over at the meeting of December 27, 1956, for a public hearing on January 17, 1957. The report was accepted and approved by the Board of Education on February 28, 1957. *Ibid.* pp. 28, 29.

14. *Ibid.*, p. 14.

It was specifically recommended that teacher assignment should be based on the needs of the schools rather than the preferences of teachers and principals.¹⁵

So long as non-white or X schools have a substantially smaller proportion of regularly licensed teachers than white or Y schools, discrimination and inferior education, apart from that inherent in residential patterns, will continue. The Constitution requires equality, not mere palliatives.

Yet the fact remains that more than eight years after the Supreme Court ruling in *Sweatt v. Painter* and more than four years after its ruling in *Brown v. Board of Education*, the Board of Education of the City of New York has done substantially nothing to rectify a situation it should never have allowed to develop, for which it is legally responsible, and with which it has had ample time to come to grips, even in the last four years.

[Board Responsible]

That the Board of Education is entirely responsible for the existing discrimination in teacher assignments, there is, in my opinion, not the slightest doubt. What the Board did was to let the teachers themselves establish the discriminatory pattern. But this was action by the Board's employees, and action by employees who, as regularly licensed teachers, were subject to such assignments as the Board chose to make. Having put the power of assignment in the hands of teachers by default, as far as their choosing or not choosing to teach in an "X school"—a euphemism which nowise changes the fact of *de facto* school segregation—the Board is bound by the acts of its servants.

Nor is this a question of niceties of the law of agency. The assigning of teachers is the exercise of a governmental function. It is no less the exercise of such a role if performed by teachers, rather than an Assistant Superintendent of Education, or the Superintendent of Education, or the Board itself. The Board of Education of the City of New York can no more disclaim responsibility for what has occurred in this matter than the State of South Carolina could avoid responsibility for a Jim Crow State Democratic Party which the State did everything possible to render "private" in character and operation. See *Rice v. Elmore*, 4 Cir., 165 F.2d 387,

15. *Ibid.*, p. 15.

certiorari denied 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151. See also both the majority and dissenting opinions in *Dorsey v. Stuyvesant Town Corporation*, 299 N.Y. 512, 532-533, 538-542, 87 N.E.2d 541, 549, 552-555, 14 A.L.R.2d 133.

Where, as here, power and responsibility for teacher assignment rests in the Board of Education, teachers who exercise that power are, in the apposite words of Mr. Justice Cardozo, "not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions." *Nixon v. Condon*, 286 U.S. 73, 88, 52 S.Ct. 484, 487, 76 L.Ed. 984.

The Board of Education can no more plead not guilty than could the Police Commissioner if he allowed patrolmen to choose not to accept dangerous or unpleasant assignments. No one would suppose that a new Police Commissioner would have performed his duty if he sought to remedy the situation by assigning police rookies to those tasks. Yet, in effect, that is all the Board of Education has done so far, in limiting the exercise of its power of assignment to the assignment of newly licensed teachers to the "X schools."

To recur to a point earlier made, this Court is not called upon to decide how soon the Board of Education could be directed to remedy what it has so long tolerated. Nor is it the function of this Court to say how the Board should go about effecting a change in the present lamentable situation, whether by compulsory assignments of veteran teachers to "X schools" for a period of years, by paying a special bonus to teachers to induce them to accept such assignments, or by providing additional services and facilities in such schools, as, for example, additional administrative personnel, to make them more attractive to teachers now working in less difficult schools.

[Unconstitutional Conditions Not Excused]

The courts of this State will not excuse failure of performance of a constitutional duty because the City of New York might be unwilling to pay the bill for the costs of what needs to be done. *Jaffe v. Board of Education*, 265 N.Y. 160, 192 N.E. 185. See, also, *O'Reilly v. Grumet*, 284 App.Div. 440, 131 N.Y.S.2d 521, affirmed 308

N.Y. 351, 126 N.E.2d 275.¹⁶ Nor will they relieve the Board of Education of its duties because of "hardship upon the existing teaching force." Cf. *Davis v. Board of Education*, 263 App.Div. 369, 371, 33 N.Y.S.2d 311, 313, modified and affirmed 288 N.Y. 330, 43 N.E.2d 67. Those are educational problems which it is the business of the Board to deal with. Surely, they are less difficult of solution than those problems that have been faced and solved by boards of education—with the help of the teachers themselves and the encouragement and assistance of community leaders—in cities like Washington, D. C., Baltimore, Maryland and Louisville, Kentucky, which, since *Brown v. Board of Education*, have changed from segregated to desegregated school systems. Here, as there, determination, resourcefulness and leadership can bring the situation in the New York City system into line with the constitutional guarantee of equal protection of the laws. Until then, the Board of Education has no moral or legal right to ask that this Court shall punish parents, or deprive them of custody of their children, for refusal to accept an un-

constitutional condition which exists in the schools to which the Board has assigned their children.

I hold the defense on grounds of inferior educational opportunities in those schools by reason of racial discrimination to be established and to bar an adjudication of neglect.

These parents have the constitutionally guaranteed right to elect no education for their children rather than to subject them to discriminatorily inferior education. I am wholly satisfied from their testimony and demeanor that this is not a case where parents have chosen to make such a choice without regard to the welfare of their children. On the contrary, it is my impression that they are doing whatever is within their means to provide alternative education, though it may not meet the requirements of the Education Law. In my judgment, the course upon which they embarked, and which brought them before this Court, was undertaken for the sake of their children and for the tens of thousands of other children like them who have been unfairly deprived of equal education.

The petitions are dismissed.

16. Compare *Borders v. Rippy*, 5 Cir., 247 F.2d 268, 272.

Appendix

Comparative Analysis of Vacancies in 16 X and 52 Y Junior High Schools of New York City¹

Manhattan					
School Number	X Schools		School Number	Y Schools	
	% Negro & Puerto Rican	% Vacancies		% Other	% Vacancies
136	100%	51%	167	85.9%	20%
139	100%	50%	52	88.8%	36%
88	99.9%	58%			
120	99.9%	50%			
83	95.1%	45%			
171	93.3%	49%			
43	86.9%	39%			
Average For 7 X Schools 48.8%			Average For 2 Y Schools 28%		

1. Board of Education Data Incomplete on 7 of the 127 Junior High Schools and therefore not included in the analysis.

COURTS

277

Bronx

School Number	X Schools		School Number	Y Schools	
	% Negro & Puerto Rican	% Vacancies		% Other	% Vacancies
120	97.4%	55%	82	95.8%	22%
55	93.3%	58%	117	96.5%	27%
40	89.6%	49%	79	97.6%	31%
52	84.9%	59%	45	93.9%	47%
			80	99.1%	31%
			115	95.7%	29%
			141	99.1%	38%
			143	94.3%	23%
			127	99.2%	23%
			135	95.6%	19%
Average For 4 X Schools 55%			Average For 10 Y Schools 29%		

Brooklyn

School Number	X Schools		School Number	Y Schools	
	% Negro & Puerto Rican	% Vacancies		% Other	% Vacancies
258	99.7%	56%	10	93.4%	61%
35	99.5%	59%	126	87.6%	50%
33	90.1%	60%	162	95.9%	26%
			62	99.4%	48%
			246	95.3%	20%
			220	98.8%	41%
			259	99.4%	10%
			223	99.5%	9%
			227	99.0%	37%
			96	99.2%	26%
			128	99.2%	19%
			228	99.5%	21%
			239	90.1%	43%
			14	98.6%	25%
			234	98.8%	13%
			240	99.5%	34%
			278	99.6%	53%
			232	99.2%	27%
			252	92.2%	24%
			285	98.6%	24%
			171	98.9%	37%
			214	95.4%	47%
Average for 3 X Schools 58%			Average for 22 Y Schools 31.6%		

Queens					
School Number	X Schools		School Number	Y Schools	
	% Negro & Puerto Rican	% Vacancies		% Other	% Vacancies
40	97.5%	41%	145	98%	32%
127	84.7%	25%	185	98.4%	23%
			10	92.2%	26%
			125	98.9%	14%
			141	99.8%	14%
			73	99%	23%
			157	99%	23%
			190	99.7%	36%
			168	97.3%	33%
			189	93.6%	23%
			218	99.7%	42%
			109	99.3%	44%
			172	99.9%	42%
			217	96.4%	25%
			67	99.6%	16%
			74	99.9%	26%
			158	96.5%	26%
			216	99.9%	33%
Average for 2 X Schools 33%			Average for 18 Y Schools 27.8%		

EDUCATION

Public Schools—North Carolina

Helen COVINGTON, personally and as mother and next friend of **Cornett Covington et al. v. J. S. EDWARDS**, Superintendent of Schools of Montgomery County, North Carolina, et al., members of the Montgomery County Board of Education.

United States Court of Appeals, Fourth Circuit, March 19, 1959, 264 F.2d 780.

SUMMARY: A class action was brought in federal district court in 1955 against officials of the Montgomery County, North Carolina, public schools to secure admission of Negroes to schools without regard to race or color. Plaintiffs' motion for a three-judge court was denied because the constitutionality of a state statute was not in issue, the *School Segregation Cases* having already rendered state constitutional and statutory requirements of racial segregation in schools unconstitutional. 139 F.Supp. 161, 1 Race Rel. L. Rep. 516 (M.D. N.C. 1956). Plaintiffs, in September, 1956, moved for leave to file an amended and supplemental complaint challenging the constitutionality of certain state school laws known as the "Pearsall Plan," which had been enacted in July, 1956 [see 1 Race Rel. L. Rep. 581, 928-940 (1956)], and seeking to make the members of the State Board of Education and the State Superintendent of Public Instruction parties defendant. The action was dismissed for failure to allege the exhaustion of administrative remedies under state pupil assignment

statutes, the court rejecting plaintiffs' contention that such exhaustion was unnecessary because the time-lapse since the *School Segregation Cases* without desegregation action by defendants overcame the presumption that the latter would obey the law and avoid unconstitutional racial discrimination. It was therefore held unnecessary to determine whether state education officials were necessary and proper parties, although the court noted that in a similar case [*Jeffers v. Whitley*, 165 F.Supp. 951, 3 Race Rel. L. Rep. 1146 (1958)] it had held they were not. 165 F.Supp. 957, 3 Race Rel. L. Rep. 1144 (1958). On appeal, the Court of Appeals for the Fourth Circuit affirmed, holding that administrative remedies must be exhausted and that nothing would be gained by joining state officials as defendants because they had no statutory authority to participate in pupil assignment and enrollment.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

PER CURIAM.

The parents of a number of Negro children in Montgomery County, North Carolina, brought this suit to secure an injunction against the Superintendent of Schools and the County Board of Education, directing the defendants to present a plan of desegregation of the races in the schools and forbidding them to assign Negroes to particular schools because of their race. The complaint was filed on July 29, 1955, as a class action by thirteen adults personally and as the next friends of the forty-five minor plaintiffs, all of whom are Negroes. The defendants filed an answer on September 22, 1955, alleging that the plaintiffs had failed to exhaust the administrative remedies provided by the State, in that they did not comply with the statutes of the State which regulate the assignment and enrollment of pupils in the public schools. On this account, the defendants moved the court to dismiss the suit, and the District Judge after hearing granted the motion.

[First Carson Decision]

We are of the opinion that the present case is ruled by the prior decisions of this court in *Carson v. Board of Education*, 4 Cir., 227 F.2d 789, and *Carson v. Warlick*, 4 Cir., 238 F.2d 724. In the first of these cases the following statement was made in the per curiam opinion (at page 790):

"* * * The Act of March 30, 1955,* entitled 'An Act to Provide for the Enrollment of Pupils in Public Schools', being chapter 366 of the Public Laws of North Carolina of the Session of 1955, provides for enroll-

* This act in its present form is found in the General Statutes of North Carolina, Chapter 115, Article 21, Secs. 115-176 to 115-179. Changes of assignment are regulated by Sec. 115-178.

ment by the county and city boards of education of school children applying for admission to schools, and authorizes the boards to adopt rules and regulations with regard thereto. It further provides for application to and prompt hearing by the board in the case of any child whose admission to any public school within the county or city administrative unit has been denied, with right of appeal therefrom to the Superior Court of the county and thence to the Supreme Court of the state. An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted. * * *

[Second Carson Decision]

This case was brought to this court a second time, in *Carson v. Warlick*, supra, after the Supreme Court of North Carolina in *Joyner v. McDowell County Board of Education*, 244 N.C. 164, 92 S.E.2d 795, had interpreted the Pupil Placement Act of the State, and had held that the factors involved in the selection of appropriate schools for a child necessitated the consideration of the application of any child or children individually and not en masse. It was shown to this court that the plaintiffs, in the action in the court below, had not attempted to comply with the provisions of the statute as so interpreted but had merely inquired of the Secretary of the Board of Education what steps were being taken for the admission of colored children to the schools of the town of Old Fort, and that the school authorities in reply merely pointed out that no Negro pupil had made application to attend the school and that the board

therefore had no cause to take any action in that connection. We therefore reaffirmed our previous decision and held that the plaintiffs were not entitled to relief because they had not exhausted their administrative remedies. In the course of the opinion Judge Parker said (238 F.2d at pages 728-729):

"Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in *Brown v. Board of Education*, 349 U.S. 294, 299, 75 S.Ct. 753, 756, 99 L.Ed. 1083:

"* * * School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles'.

"It is argued that the statute does not provide an adequate administrative remedy because it is said that it provides for appeals to the Superior and Supreme Courts of the State and that these will consume so much time that the proceedings for admission to a school term will become moot before they can be completed. It is clear, however, that the appeals to the courts which the statute provides are judicial, not administrative remedies and that, after administrative remedies before the school boards have been exhausted judicial remedies for denial of constitutional rights may be pursued at once in the federal courts without pursuing state court remedies. *Lane v. Wilson*, 307 U.S. 268, 274, 59 S.Ct. 872, 83 L.Ed. 1281. Furthermore, if administrative remedies before a school board have been exhausted, relief may be sought in the federal courts on the basis laid therefor by application to the board, notwithstanding time that may have elapsed while

such application was pending. Applicants here are not entitled to relief because of failure to exhaust what are unquestionably administrative remedies before the board.

"There is no question as to the right of these school children to be admitted to the schools of North Carolina without discrimination on the ground of race. They are admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. *Henderson v. United States*, 339 U.S. 816, 824, 70 S.Ct. 843, 94 L.Ed. 1302. It is the state school authorities who must pass in the first instance on their right to be admitted to any particular school and the Supreme Court of North Carolina has ruled that in the performance of this duty the school board must pass upon individual applications made individually to the board. The federal courts should not condone dilatory tactics or evasion on the part of state officials in according to citizens of the United States their rights under the Constitution, whether with respect to school attendance or any other matter; but it is for the state to prescribe the administrative procedure to be followed so long as this does not violate constitutional requirements, and we see no such violation in the procedure here required. * * *

[Remedy for Board's Inaction]

We are advertent to the circumstances upon which the plaintiffs rest their case, namely, that the County Board has taken no steps to put an end to the planned segregation of the pupils in the public schools of the county but, on the contrary, in 1955 and subsequent years, resolved that the practices of enrollment and assignment of pupils for the ensuing year should be similar to those in use in the current year. If there were no remedy for such inaction, the federal court might well make use of its injunctive power to enjoin the violation of the constitutional rights of the plaintiffs but, as we have seen, the State statutes give to the parents of any child dissatisfied with the school to which he is assigned the right to make application for a transfer and the right to be heard on the question by the Board. If after the hearing and final decision he is not satisfied, and can show that he has been discriminated against because of his race, he may

then apply to the federal court for relief. In the pending case, however, that course was not taken, although it was clearly outlined in our two prior decisions, and the decision of the District Court in dismissing the case was therefore correct. This conclusion does not mean that there must be a separate suit for each child on whose behalf it is claimed that an application for reassignment has been improperly denied. There can be no objection to the joining of a number of applicants in the same suit as has been done in other cases. The County Board of Education, however, is entitled under the North Carolina statute to consider each application on its individual merits and if this is done without unnecessary delay and with scrupulous observance of individual constitutional rights, there will be no just cause for complaint.

[*State Officials Not Necessary*]

The appellants also raise the point that the

District Judge was wrong in rejecting the motion of the plaintiffs to amend the bill of complaint by joining the State Board of Education and the Superintendent of Public Instruction of the State as parties defendant. It is pointed out that the State Board has general control of the supervision and administration of the fiscal affairs of the public schools and other important powers conferred by the General Statutes, secs. 115-4, 115-11 and 115-283. The provisions of sec. 115-178 of the Pupil Placement Act, however, places the authority in the County boards of education to make the assignments and enrollment of pupils and contains no direction for the participation of the State Board of Education in these matters. We therefore think that nothing would be gained by joining these officials as additional defendants and that the judge was correct in denying the motion to amend the complaint.

Affirmed.

EDUCATION

Public Schools—North Carolina

Joseph Hiram HOLT, Jr., a Minor, by His Next Friend, Joseph Hiram Holt and Elwyna Holt v. RALEIGH CITY BOARD OF EDUCATION, a Body Corporate.

United States Court of Appeals, Fourth Circuit, March 19, 1959, 265 F.2d 95.

SUMMARY: A Negro high school student and his parents filed an action in federal district court against Raleigh, North Carolina school officials for declaratory and injunctive relief regarding the student's right to attend the public schools without discrimination because of race. Plaintiffs lived nearer an all-white high school than the all-Negro school to which the boy had been assigned on May 30, 1957. On June 8, 1957, plaintiffs applied for change of assignment of the boy to the white school, citing geographical convenience, academic and extra-curricular advantages, and the benefit of removing the stigma of racial segregation. [See 1 Race Rel. L. Rep. 240; 939 (1956) for the North Carolina Pupil Assignment Act.] At an August 6, 1957 meeting which plaintiffs did not attend although invited, the Board denied the application. Plaintiffs by letter protested the action taken and applied for a hearing as provided by the Act, which the board notified plaintiffs would be held on August 23. Plaintiffs did not attend this hearing personally but were represented by their attorney, who presented a power of attorney and a petition requesting the Board to reconsider and reverse its previous action. The Board, at its next meeting, voted not to rescind the August 6 action. The district court held that plaintiffs had failed to exhaust their administrative remedies under the Pupil Assignment Act, stating that plaintiffs should have appeared personally at the August 23 hearing, since the Pupil Assignment Act contemplates an opportunity for the board to interview personally the applicant with regard to the reasons given for entitling him to reassignment. Since plaintiffs made no request that the case be retained on the court's

docket until they had had an opportunity to exhaust their administrative remedies, the case was dismissed. 164 F.Supp. 853, 3 Race Rel. L. Rep. 917 (E.D. N.C. (1958)). On appeal, plaintiffs contended that their attorney's attendance at the hearing satisfied the statutory requirement because the Act should not be construed as clothing the Board with general investigatory powers so as to sanction a request of plaintiffs to submit to interrogation. It was contended that such procedure would disable the Board from conducting the impartial quasi-judicial hearing required by the Act to make a final determination of plaintiffs' application. The Court of Appeals for the Fourth Circuit, in affirming, rejected this argument, pointing out that courts had generally approved the practice of conferring both investigatory and quasi-judicial powers upon the same governmental agency, and holding that the Board was within its right here to request the child and parents to appear for questioning before passing on their application and that the latter were delinquent in refusing to comply.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

SOPER, Circuit Judge.

This action was brought on behalf of Joseph Hiram Holt, Jr., a Negro student, fifteen years of age, residing in Raleigh, North Carolina, to secure a transfer from the Ligon High School to the Broughton High School in that city. The plaintiffs are the minor child, by his father as next friend, and his parents, and the defendant is the Raleigh City Board of Education.

Up to this time only colored students have attended the Ligon School and only white students the Broughton School. The authority to provide for the assignment and enrollment of pupils in the public schools of the State is conferred upon County and City Boards of Education by the General Statutes of North Carolina, 1957 Cumulative Supplement, Chapter 115, Article 21, §§ 115-176 to 115-179. Section 115-178 relating to reassignment of pupils is as follows:

"§ 115-178. *Application for reassignment; notice of disapproval; hearing before board.*

—The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a board of education may, within ten (10) days after notification of the assignment, or the last publication thereof, apply in writing to the board of education for the assignment of the child to a different public school. Application for reassignment shall be made on forms prescribed by the board of education pursuant to rules and regulations adopted by the board of education. If the application for reassignment is disapproved, the board of education shall give notice to the applicant by registered mail, and the applicant may

within five (5) days after receipt of such notice apply to the board for a hearing, and shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school. A majority of the board shall be a quorum for the purpose of holding such hearing and passing upon application for reassignment, and the decision of a majority of the members present at the hearing shall be the decision of the board. If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail."

[Assignment Made]

On May 30, 1957, the Board of Education of the City of Raleigh issued a certificate that the minor plaintiff had satisfactorily completed the ninth grade in the Ligon School and assigned him to the same school for the ensuing year. On June 8, 1957, his parents filed with the principal of the school an application for the reassignment of the child to the Broughton School on the grounds: (1) that the Ligon School was three miles from his residence, while the Broughton School was less than a mile dis-

tant; (2) that the Broughton School offered a fuller academic and extra-curricular program, and (3) that the transfer would remove the stigma of racial segregation.

The application was referred to the Board of Education which, after some discussion, set the matter down for consideration at a regular meeting of the Board to be held on August 6, and directed its Secretary to request the child and his parents to attend the meeting since there probably would be questions which the members of the Board would desire to ask them. Accordingly, the plaintiffs were notified of the meeting and were requested to be present; but they failed to attend. Their attorneys wrote to the Board that the plaintiffs would not attend the meeting but would await the decision of the Board upon their application since, under the statute above quoted, the Board's initial action on an application for reassignment was purely *ex parte*. In the absence of the plaintiffs, the Board met and considered the application at the appointed time and adopted a resolution denying the application at that time "in the public interest and in the interest of Joseph Hiram Holt, Jr."

The plaintiffs were notified of this decision and within ten days thereafter, as required by the statute, made application for a hearing. In response the Board called a meeting for August 23, and notified the plaintiffs. They failed to appear in person at that time also but were represented by their attorneys, who requested the Board to rescind its denial of its application. The Board then adopted a resolution that a committee of the Board give further study to the matter and report at the next meeting of the Board. This was accordingly done. The report of the committee recommended that the prior action of the Board be not rescinded and the Board approved this recommendation.

[Suit Instituted]

The present suit was then instituted, in which the plaintiffs prayed the court to issue a mandatory injunction requiring the Board to admit the minor plaintiff to the Broughton School without regard to his race or color. The question came on for hearing in the District Court, in which the following facts were proved.

It was brought out in the testimony that the plaintiffs' application was the first application for the transfer of a colored child to a white

school, or vice versa; and that the Board desired the presence of the plaintiffs at the meeting of August 6th in order that it might obtain additional information about the case and, amongst other things, ascertain the basis of the plaintiffs' statement that the academic program at the Ligon School was inferior to that at the Broughton School. Members of the Board testified that they were influenced in their final decision by what they considered to be best in the interest of the child as well as in the public interest, and some of them testified that the race of the child was one of the elements that influenced their conclusion. The District Judge upheld the action of the Board and dismissed the complaint on the ground that the plaintiffs had failed to exhaust the administrative remedies provided by the statute by declining to attend the meetings of the Board when the matter was under consideration. He relied on the decisions of this Court in *Carson v. Board of Education of McDowell County*, 227 F.2d 789, and *Carson v. Warlick*, 238 F.2d 724, where we held, in respect to the North Carolina statute in question, as it appeared in Chapter 366 of the Session Laws of North Carolina of 1955, that if an administrative remedy is provided by state law for persons who are aggrieved by the action of school officials, the courts of the United States will not interfere until the statutory remedy has been exhausted.

[Plaintiffs' Contentions]

It is contended by the plaintiffs that the application of this rule in the case as bar was erroneous. It is pointed out that § 115-178 of the statute provides that parents who desire reassignment of a child must first make application to the Board within ten days after the assignment is made, and if their application is refused they must then apply to the Board for hearing within five days, and that there is no requirement that the parents attend the meeting of the Board at which the application is first considered nor any requirement that the applicants attend the subsequent hearing in person. Having filed the application for reassignment and the petition for hearing within the prescribed periods, and having attended the hearing by attorneys, it is said that the plaintiffs have satisfied every requirement of the Act.

The basis of the plaintiffs' position seems to be that the statute cannot be construed to clothe

the Board with investigatory powers and functions and also with the authority and duty to conduct a final hearing of a quasi-judicial character in order to make a final determination of the plaintiffs' application. Such a construction, it is argued, is not tenable since the exercise of general exploratory and investigatory powers would disable the Board from conducting the impartial hearing which the statute requires it to hold. Hence, it is said that the parents and child had no proper place at the meeting of the Board on August 6, and the Board had no power to request them to attend to submit to interrogation. In this connection, the plaintiffs refer to *Ohio Bell Telephone v. Public Utilities*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093.

[Combination of Functions Approved]

We cannot agree with this analysis. In this day when administrative agencies and tribunals carry on the operations of government in many fields of activity, it would be an anachronism to hold that investigatory and quasi-judicial powers may not be conferred upon the same governmental agency. Indeed, such a combination of functions is established practice generally approved by the courts and subject to judicial review in case of abuse. In the operation of the public schools, such an arrangement is well-nigh essential and the North Carolina statute implies that both functions shall be exercised by the boards of education. We think that in this instance the Board, when requested to transfer the child from one school to another, was clearly within its right before making its initial decision in requesting the child and his parents to appear for interrogation, and that they on their part were clearly delinquent in refusing to attend and to furnish all relevant information in their possession. They were not justified in deferring their appearance until the "formal hearing" provided by the statute for a review of an adverse decision, or failing, even at that stage, to appear in person and submit to examination by members of the Board. The situation was well described in the following passage from the opinion of the District Judge [164 F.Supp. 866]:

"* * * It must be remembered that the written application for a change of assignment complained, in addition to racial discrimination and the difference in distance from plaintiffs' home to the two schools in-

involved, that Broughton High School offered all the courses in which the minor plaintiff was interested and a fuller academic and extra-curricular program. Many of the Board members who testified at the trial stated that they were particularly interested in this phase of the complaint, as they had considered that Ligon High School was comparable in every respect, including the curricula offered, with the Broughton High School. It perhaps could logically be argued that these complaints were not necessary in order to entitle the minor plaintiff to reassignment, but the plaintiffs nevertheless saw fit to include these complaints in their application and it would seem that since the complaints had been made that the Board members had the right to discuss these complaints with the minor plaintiff and his parents. Further, the Board undoubtedly had the right to inquire into many other relevant and pertinent matters in order to gain sufficient information to enable it to make the findings required by statute."

[Segregation Not Approved]

We are not to be understood as approving the deliberate segregation of the races in the public schools of the city or the questioning of applicants on irrelevant matters. The regulations adopted by the Board in 1957, pursuant to § 115-176 of the statute, tended to perpetuate the system, for they provided that each child attending a school by assignment of the Board was assigned to the same school for the ensuing school year. Moreover, certain members of the Board testified in the District Court that they were influenced, at least in part, in passing on the application for reassignment by the race of the plaintiffs. With these and other pertinent considerations in mind the District Judge might not have felt obliged to dismiss the complaint if he had reached the merits of the case, but he was restricted in the scope of his decision by the failure of the plaintiffs to do their part in giving effect to the plan of the statute. In so doing, he was acting in accordance with the rule approved by this court that persons aggrieved by the actions of the school officials of a State may not appeal for relief to the Federal courts until they have exhausted the remedies afforded them by the statutes of the State.

Affirmed.

EDUCATION

Public Schools—Tennessee

Alonzo BULLOCK, William A. Brakebill, Lawrence J. Brantley, Clyde A. Cook, Mary Nell Currier, and Willard H. Till v. UNITED STATES of America.

Frederick John KASPER v. UNITED STATES of America.

United States Court of Appeals, Sixth Circuit, February 27, 1959, April 30, 1959, 285 F.2d 683.

SUMMARY: In a class action filed prior to the decision of the United States Supreme Court in the *School Segregation Cases*, the United States District Court had directed, on January 4, 1956, that school officials of Anderson County, Tennessee, admit pupils to the Clinton high school on a racially nondiscriminatory basis, beginning with the fall, 1956, school term. 1 Race Rel. L. Rep. 317. On August 29, 1956, school officials obtained an order from the court restraining John Kasper and other named and unnamed persons from interfering with the school officials' compliance with the court's order. Soon thereafter Kasper was convicted of criminal contempt for violating the restraining order. 1 Race Rel. L. Rep. 872, 1045 (1956), affirmed by the Court of Appeals for the Sixth Circuit, 2 Race Rel. L. Rep. 792 (1957). On December 5, 1956, the court issued an order of attachment against seventeen other persons for contempt of the court's order of January 4, 1956. 2 Race Rel. L. Rep. 26. On petition by the United States Attorney, the court issued an amended order of attachment on February 25, 1957, against all the defendants in the name of the United States. 2 Race Rel. L. Rep. 317. At the trial there was a dismissal as to six of the defendants, but seven others were convicted. —F.Supp.—, 2 Race Rel. L. Rep. 795 (E.D. Tenn. 1957). On appeal, the Court of Appeals for the Sixth Circuit found no reversible error. In overruling numerous contentions of appellants, the court held, inter alia, that: the verdict was supported by the evidence; various alleged violations of the Federal Rules of Civil Procedure did not occur as those Rules do not apply to criminal contempt actions; the injunction of August 29, 1956, was valid in that the petition therefor showed a threat of immediate and irreparable injury, and even if invalid, defendants were chargeable with criminal contempt for violating it while it remained in force; the court's charge concerning the necessity of the jury being convinced beyond a reasonable doubt of the existence of each element of the offense before convicting was accurate. It was also held specifically as to Kasper, that his constitutional rights were not violated in that: speech calculated to cause a violation of the law is not privileged; one is not put twice in jeopardy when prosecuted at different times for successive and separate offenses; the passage of four months before trial did not constitute denial of a speedy trial in the absence of a showing of prejudice; and refusal to transfer the prisoner from Florida to a prison in or near Washington, D. C., where his attorney was located did not deprive him of effective assistance of counsel. The judgment was affirmed and a petition for rehearing was denied. (Certiorari denied 79 S.Ct. 1294, 4 Race. Rel. L. Rep. 252, *supra*).

Before ALLEN, Chief Judge, MILLER, Circuit Judge, and THORNTON, District Judge.

ALLEN, Chief Judge.

These appeals grew out of proceedings charging appellants and others with criminal contempt under Title 18, U.S.C., Section 401(3). The contempt proceedings were heard as one case in the District Court, severance having been denied. The appeals were argued separately before this court on behalf of appellants Bullock, et al., hereinafter called Bullock (Appeal No. 13,512), and by appellant Kasper (Appeal No. 13,513). Many questions raised by Bullock

and by Kasper are identical and will be discussed in general without designation of particular parties. A motion for judgment of acquittal was made by all defendants and denied and the case was submitted to the jury. Four of the persons charged were acquitted, but the jury found defendants Bullock, Brantley, Brakebill, Cook, Currier, Till and Kasper guilty of criminal contempt under Title 18, U.S.C., Section 403(1). The District Court entered a judgment sentencing all appellants for criminal contempt of court.

The court held that appellants had violated an order of the District Court issued January 4, 1956, in *McSwain v. County Board of Education of Anderson County, Tennessee*, 138 F.Supp. 570, requiring the discontinuance of racial segregation in Clinton High School, Clinton, Anderson County, Tennessee, by the fall term of 1956. Pursuant to this order such integration was put into effect by the school executives and teachers. Twelve negroes were enrolled in a school having approximately 800 white pupils.

[Kasper's Actions]

August 25, 1956, Kasper came to Clinton, and thereafter tried to induce various persons to oppose the obedience of the school officials to the order, and threatened to have the principal of the school ousted. Kasper took other steps aimed at preventing the effectiveness of integration and achieving the restoration of segregation in the high school, helping to set up widespread organizations for this purpose among the citizens and the high school students.

On the petition of D. J. Brittain, Jr., principal of the high school, and others, the court on August 29, 1956, issued a temporary restraining order against one John Kasper and others, enjoining them, "their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them * * * from further hindering, obstructing, or in anywise interfering with the carrying out of the aforesaid order of this Court [the integration order of the court issued January 4, 1956], or from picketing Clinton High School, either by words or acts or otherwise." None of the appellants in the Bullock group were named in this order. The temporary restraining order was personally served on Kasper on August 29. Thereafter, a preliminary injunction issued upon hearing and after further hearing by the District Court the injunction was made permanent on September 6, 1956.

On December 5, 1956, the United States Attorney filed a petition charging the Bullock group and others with criminal contempt for violating the injunction and on that date an order of attachment was issued by the court describing in detail certain alleged acts of criminal contempt and ordering that the persons named be apprehended and tried.

On February 25, 1957, the court ex parte issued an amended order of attachment stating that the present appellants and others had

actual notice of the permanent injunction of September 6, 1956, and that the present appellants and others had, during the months of November and December, 1956, "entered into an agreement or agreements to violate and to cause others to violate" the injunction, and that these appellants and others in active concert and participation with Frederick John Kasper had violated the permanent injunction in respects set out in the amended order. Under this amended order Gates and Kasper were arrested and given bail. The trial started July 8, 1957. The overt acts referred to in the amended order of attachment were not the same as the acts charged in the original attachment order. It was charged in the amended order of attachment (1) on or about November 27, 28, 29, 30, and December 3 and 4, 1956, appellants and others congregated in a threatening manner along the route to the Clinton High School taken by negro students and intimidated them from attending Clinton High School. Charge 2 was dropped because John Gates died before the trial. It was charged (3) on December 4, 1956, when Rev. Paul Turner escorted the negro students to the school, he was vilified, attacked and badly beaten by appellants.

[Evidence at Trial]

Evidence as to the following facts was shown at the trial: For a number of days in September and for several days in the latter part of November, 1956, all local newspapers and radio and television stations gave great publicity to the temporary restraining order issued by the District Court on August 29, 1956. These broadcasts and newspaper articles made it plain that the injunction prohibited interference with the integration of Clinton High School and the picketing of Clinton High School.

During the week following August 27, 1956, there had been considerable disturbance outside the high school. Enrollment dropped greatly but thereafter, until the end of November, the problems subsided and attendance rose. On November 27 or 28 appellants Brakebill, Brantley and Bullock stationed themselves at the street intersection which the negro children had to pass to reach the high school. Appellants remained until 8:30, the opening hour for school, or until 8:45 a.m. This surveillance was repeated every day for the remainder of the week. The negro children did not come to school. On Monday, December 3, appellants

appeared again at the same place. Cook and Bullock made abusive remarks about Rev. Turner, the integrationist who planned to accompany the negro children to the school. Bullock stated that if the negro children were not taken out of the school someone would get killed.

On Tuesday, December 4, many cars were parked in the area of the road leading from the negro section to the school. Bullock, Cook and Rev. Turner were present. Cook told Rev. Turner that they wouldn't let him get away with escorting the negro children to the school. The chief of police asked Bullock to leave before there was trouble, but Bullock refused, stating, "You want me to leave so that you can bring these colored children down here to school." Bullock said that he was up there "to keep us 'nigger lovers' from taking those 'niggers' to school" and that he would keep the white school white and there would be trouble. Later the same morning Rev. Turner and two other men escorted the negro children through the crowd to the school. Brakebill, Cook and Currier made threatening statements to the negro children and to the men escorting them and followed Turner and the children down the hill, obscene remarks being made. After Turner had escorted the negro children to the school and come back there was more abusive language from Brakebill, Bullock and Currier. Turner walked on and Cook attacked him. Turner backed away but was followed and Cook struck Turner, who was unarmed. Turner pushed his way through the crowd to an automobile and was pounded against the fender. Turner fell on his knees and his head was pushed against the fender while the crowd yelled "Kill him." The police came and arrested Cook.

Appellants did not deny this testimony. They introduced evidence that while they were opposed to integration they were seeking legal means to do away with it; that the members of the White Citizens Council, organized during this general period, did not believe in violence; that there was no trouble until the Rev. Turner decided to bring the negro children to school.

[Kasper Notified of Injunction]

The District Court found that Kasper had actual notice of the permanent injunction of September 6, 1956. Kasper also had received personal notice of the temporary restraining order of August 29, 1956, which was served on

him by the United States Marshal. Kasper took the order from the Marshal after a portion of it was read to him, stating "I know what it is. It is an injunction prohibiting me from interfering here in this school business." Kasper had previously been found guilty of contempt of court for inciting the citizens of Clinton and of Anderson County in a speech he made on August 29, 1956, to violate the restraining order. *Kasper v. Brittain*, 245 F.2d 92 (C.A. 6), certiorari denied 355 U.S. 834.

Kasper was active in forming the White Citizens Council in Clinton and the Tennessee White Youth. He was the consultant on all questions of framing charters and in general gave advice and counsel to the groups which met at Ann's Cafe and the Southland Cafe in Clinton. Kasper was seen meeting with the students of the Clinton High School. Testimony was given as to frequent meetings in a room of the Southland Cafe. The charter of the White Citizens Council was taken out by several citizens of Clinton, including John Kasper. Kasper issued a press release in connection with the formation of Tennessee White Youth. He paid to have the charter notarized and drove around the county with those active in the formation of this group.

Kasper also directly took part in inciting individual citizens to violate the order of the court. As testified by Mr. D. J. Brittain, the principal of the High School, Kasper had the following conversation with him:

Q. What did he say?

A. Well, Mr. Kasper asked me what I was going to do in regard to getting the Negroes out of Clinton High School. And I told him I could not do anything as we were under a court order to accept these Negroes in Clinton High School.

Q. Was there anything else said between you and him?

A. Yes. He stated to me that other people other places had not accepted these people. I told him that I was under the impression that these people were not under a court order as we were.

* * *

A. Well, there was more discussion. There was several people there that asked questions and made comments, and Mr. Kasper then said, "Let's get back to this

issue." He said, "What are you going to do?"

And I told him that I had only three courses. One was to obey the law, second disobey the law; third, resign my job, and that I intended to obey the law.

• • • he finally said that they would get me out of the school before the year was over • • •

Similar testimony was given by James Leo Burnett, who said in answer to questions put to him:

A. John Kasper came to my home the latter part of August. I expect it was the first day he was in town. And asked me to join in his program of ousting the Negroes from Clinton High School.

Q. Where did you have that conversation with him?

A. In my back yard.

Q. At your home?

A. Yes, sir.

Q. Was that before or after school had started?

A. That was before school started.

Also on the morning of December 4, Burnett testified that Kasper was talking to the Rev. Turner. He said, "Is your name Turner? • • • he said, "You can't get away with this."

[Evidence Supported Verdict]

Both Kasper and the Bullock group urged that the verdict was not supported by the evidence. The recital of the above facts requires the contrary conclusion.

A motion for severance was made by Bullock on the ground that for the Bullock group to be tried with Kasper would greatly prejudice the Bullock case. The denial of this motion by the court is assigned as reversible error. In ruling on questions of severance the District Court is vested with a wide discretion. Fed. Rules Cr. Proc. rule 14, 18 U.S.C. Such refusal is not assignable as error unless abuse of discretion is affirmatively shown. *Stilson v. United States*, 250 U.S. 583. In view of the close connection between Kasper and the Bullock group as manifested in the presence of all appellants at, encouragement of, and participation in acts of

violence committed December 4, 1956, in an effort to hinder and destroy obedience to the lawful order of the court, we conclude that the discretion of the court was not abused.

Appellants contend that the District Court erred in issuing the injunction for the reason that Rule 17 of the Federal Rules of Civil Procedure was violated. They assert this because of the alleged fact that the action seeking an injunction was not prosecuted in the name of the real parties in interest.

The petition for prosecution for criminal contempt due to the violation of the permanent injunction order of September 6, 1956, was filed by the United States Attorney December 5, 1956. The first order for attachment was based upon this petition. However, the petition of August 29, 1956, praying for a temporary restraining order, was filed by the principal of Clinton High School, a member of the Board of Education of Anderson County, the Assistant Attorney General for the 19th Judicial Circuit for the State of Tennessee, and two attorneys who had been connected with the desegregation litigation of Clinton High School. These persons sought the protection of the court for the High School in their concern for the maintenance of "respect for the laws of Tennessee and the United States and respect for the District Court and the Supreme Court of the United States. • • •"

[Federal Rules Inapplicable]

We think the Federal Rules of Civil Procedure, including rule 17, have no application to a criminal contempt action which is instituted by notice under rule 42(b) of the Federal Rules of Criminal Procedure, Title 18. The rules governing criminal contempt are found in this rule 42, Federal Rules of Criminal Procedure, sub-section (b) of which reads as follows:

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the

defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

The provisions for arrest, bail and punishment have more of a criminal than a civil character. Since the action is punitive and sentence is imposed for the purpose of vindicating the authority of the court, *United States v. United Mine Workers of America*, 330 U.S. 258, the public has an interest in the controversy. The public interest of the parties who sought the temporary restraining order was held in *McSwain v. County Board of Education of Anderson County, Tennessee*, supra, to be sufficient to permit them to seek injunctive relief. The District Court stated in the first Kasper case (*Kasper v. Brittain*) that in criminal contempt it was "only necessary for some reputable party or parties to make known to the Court that a prima facie case exists that the Court's order is being violated." Inasmuch as this court upheld the conviction on appeal this point has been adjudicated. Also, appellants, not having appealed from the order of the injunction, have waived the right to attack the court's jurisdiction in a criminal contempt proceeding. *Jennings v. United States*, 264 Fed. 399 (C.A. 8).

[Immediate, Irreparable Injury]

The further contention that the injunction of August 29, 1956, is invalid under Federal Rule of Civil Procedure 65 because there was no showing of immediate and irreparable injury in the petition for the temporary restraining order also is without merit. This order was issued without notice to Kasper and certain other named persons. However, it was alleged in substance in the petition that immediate and irreparable injury would be sustained by the school and Anderson County if the actions of the defendants were not restrained. The temporary restraining order in its terms specifically com-

plied with the provisions of rule 65, whether or not the Rules of Civil Procedure be considered applicable here. The petition described picketing at the school with large and threatening crowds continuously keeping students from the school, an attack being made upon a negro child. This constitutes in effect an allegation of immediate and irreparable injury. A full hearing was had with respect to the permanent injunction. Even if the injunction was invalid, appellant was chargeable with criminal contempt for violating it, for the order of the District Court was in full force and effect until set aside in an orderly way. *United States v. United Mine Workers of America*, supra, 290, 291, 292.

[District Court's Jurisdiction]

The District Court had jurisdiction to issue the injunction. Title 28, U.S.C., Section 1651. As pointed out by Chief Judge Simons in *Kasper v. Brittain*, supra, it would seem that the case of *Brown v. Board of Education*, 349 U.S. 294, its associated cases, and the judgment of this court in *McSwain v. County Board of Education of Anderson County, Tennessee*, supra, constitute a conclusive response to appellant's contentions on this point. As the Supreme Court stated in *Brown v. Board of Education*, supra:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power."

Brewer v. Hoxie School District No. 46 of Lawrence County, Arkansas, 238 F.2d 91, 98 (C. A. 8), in a full review of the question declared:

"* * * jurisdiction of the federal courts to issue injunction to protect rights safeguarded by the Constitution is well established. See * * * *Bell v. Hood*, supra, 327 U.S. at page 684, * * * 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a

general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' An injunction will issue wherever necessary 'to afford adequate protection of constitutional rights,' *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 95, * * *. Federal courts have the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available."

To the same effect see *Kasper v. Brittain*, *supra*.

[Order Substitution Valid]

All appellants contend that it was reversible error to substitute for the order of attachment issued December 5, 1956, the amended order issued February 25, 1957. They urge that the amended attachment order changed the original proceedings from one arising out of a civil suit to a prosecution for criminal conspiracy by the United States against individuals not originally named and others. This contention in material points is not correct. The original petition filed August 29, 1956, prayed for injunctive relief against the picketing of the high school and also asked the court to issue show cause orders why Kasper and five others should not be held in contempt of the orders of the court. The amended order did not allege violation of the conspiracy statute, Title 18, U. S. C., Section 371, but charged criminal contempt.

Rule 42 of the Federal Rules of Criminal Procedure provides that criminal contempt actions are initiated neither by indictment nor by information, but by simple notice. The requirements of the section are less strict and technical than those of the statutes under which criminal causes are instituted. The contempt proceeding is summary in character and technical pleadings are not required. *MacNeil v. United States*, 236 F.2d 149 (C. A. 1), certiorari denied 352 U.S. 912. See also *United States v. United Mine Workers of America*, *supra* 296-7. In that case the contempt described in the petition was not denominated "criminal as required by the rule." Defendants urged that the omission of the words "criminal contempt" from the petition and rule to show cause was prejudicial error. The Supreme Court held that Rule 42 (b) "requires no such rigorous application" and

stated, "Its purpose was sufficiently fulfilled here * * *."

Decisions involving requirements for the framing or amending of indictments are not applicable. We therefore do not discuss many authorities relied on by appellants.

Appellants contend that the second attachment order violated Rule 7 (e) of the Federal Rules of Criminal Procedure which provides that the court may permit an information to be amended at any time before the verdict if no additional offense is charged and if substantial rights of the defendant are not prejudiced.

No rights of the appellants were violated by the issuance of the second attachment. The original attachment and the amended attachment each charged the same offense, namely, criminal contempt. The temporary restraining order of August 29, 1956, enjoining and restricting John Kasper and others from hindering, obstructing, or in anywise interfering with the carrying out of the integration order of January 4, 1956, was addressed not only to the agents, servants, representatives and attorneys of Kasper and others, but to "all other persons who are acting or who may act in concert with them * * *." The addition in the amended order for attachment of an allegation of an agreement to violate and cause others to violate the injunction in active concert and participation with Frederick John Kasper fell within the terms of the temporary restraining order of August 29, 1956, made permanent on September 6, 1956. The essence of the charge in both attachment orders was that appellants had violated the injunction of the District Court. No additional offense was charged. Appellants were cited both in the original order and the amended order. Kasper, the only appellant added by the amendment, makes no objection on this point.

Neither were appellants prejudiced by the amendment. While the overt acts charged in the original attachment were previous to and hence different from those charged in the amended order, appellants had ample notice of all acts charged and full understanding of what they were. Cf. *United States v. United Mine Workers of America*, *supra*, 296, 297. The amended order was issued on February 25, 1957. The trial started on July 8, 1957, and appellants had ample opportunity to prepare for hearing.

The fact that Kasper's application for a bill of particulars was refused is not material. The charge was specific and detailed. Kasper was

not entitled to be given details of the government's evidence to be presented at the trial. The *Kansas City Star Company v. United States*, 240 F.2d 643 (C. A. 8).

[Jencks Rule Not Violated]

It is urged that reversible error existed because before the hearing appellants requested the production of all statements and other matter bearing on the testimony which might be given by Government witnesses. This request was renewed at the trial. The court ruled that appellants would be entitled to receive statements of a witness produced by the Government only after the witness had testified. Also the court deleted portions of certain statements which it considered not relevant. Relying on *Jencks v. United States*, 353 U.S. 657, appellants contend that the pre-trial production of all statements given to the FBI in the case is required. On the contrary, the *Jencks* opinion points out that the petitioner was entitled to an order directing the production of statements "touching the events and activities" as to which certain witnesses "testified at the trial."

The statute, 18 U.S.C., Section 3500, enacted shortly after the announcement of the *Jencks* case, expressly prohibits pre-trial discovery of such reports. It is significant that the Senate Report upon the Bill, No. 981, 85th Congress, 1st Session, Appendix p. 8, states that the provision prohibiting pre-trial disclosure was inserted to avoid the misinterpretation of *Jencks v. United States* which had occurred in some court decisions, a matter which was surprising to the Committee, particularly when the "overwhelming judicial thought . . . [is that *Jencks*] does not apply to pre-trial production." Pre-trial discovery of such material has been denied in numerous district court cases subsequent to the *Jencks* case.

The Government's appendix shows that the court complied fully with the principle of *Jencks v. United States*. In fact, it presents many instances in which material asked for from a particular witness was placed at the disposal of appellants' attorney at the opening of the examination. Since such reports must be of the events and activities related in the testimony, *Jencks v. United States*, supra, clearly the trial court must determine whether the statement or portions thereof touch upon such events and activities. It was not error for the District Court

to screen the reports to determine whether some part of them was irrelevant and immaterial.

[Jury Charges Attacked]

Various prejudicial errors are claimed to exist in the charge. With reference to the attack on Rev. Turner the court characterized Rev. Turner's act in conducting the negro children to the high school as a "well-intentioned contribution" and as a "good deed." Appellants say this was an invasion of the province of the jury. Whatever influence these words might have had against appellants was wiped out by the later charge of the court that "From the standpoint of segregation it might not be considered a well-intentioned contribution." The court properly left it to the jury to determine what Rev. Turner's intention was.

It is also contended that the District Court did not adequately charge the jury that the prosecution must prove beyond a reasonable doubt the agreement or agreements between appellants.

The court instructed the jury that before it could convict it must find three facts:

- (1) That appellants had notice of injunction.
- (2) That appellants committed acts in violation of the injunction in concert with Kasper.
- (3) That these acts had the effect of hindering or obstructing the integration of the Clinton High School in violation of the injunction.

Under the charge the jury was required to be convinced beyond a reasonable doubt of the existence of each of these elements of the offense before it could convict. Read as a whole the charge is fair and accurate.

Also, appellants claim that the refusal of the court to charge that the failure of the Government to subpoena any of the negro high school children raised a presumption that their testimony would be unfavorable to the Government. The refusal was not erroneous. It was not shown to be peculiarly within the power of the Government to produce the witnesses. It is only when this fact appears that the presumption arises. *McGuire v. United States*, 171 F.2d 136 (C.A.D.C.). As the witnesses were equally available to both parties, the court did not err in refusing the instruction. *Shurman v. United States*, 233 F.2d 272 (C. A. 5).

[Jury Handbook Attacked]

Appellants also say it was reversible error for the lower court to allow the court clerk to issue to each member of the jury panel a publication entitled "Handbook for Jurors serving in the United States District Courts." This contention relies upon *People v. Weatherford*, 160 P.2d 210; *The People v. Schoos*, 399 Ill. 527, and *United States of America v. Gordon* (C. A. 7), No. 11,929, opinion on July 16, 1957. In the latter case the judge of the District Court had distributed the same pamphlet given out by the court in the case at bar and this was held to be reversible error. However, in *United States v. Gordon*, 253 F.2d 177 (C. A. 7), a case heard by the court en banc, the former opinion issued July 16, 1957, was superseded and withdrawn. The Court of Appeals said that, assuming the entire panel read the handbook and that the handbook contained statements inimical to a defendant in a criminal case, the defendant had the right of challenge to the polls. Failure to make the objection on the *voir dire* examination, the court held, constitutes a waiver, for jurors cannot be challenged for bias by a motion for new trial. *Frazier v. United States*, 335 U.S. 497. Under this authority the objection was waived in the instant case, for no objection was made on the *voir dire* examination.

Also, we hold that the District Court did not err in distributing this handbook. It was a pamphlet for the instruction of jurors authorized by the National Judicial Conference, composed of the chief judges of all the circuits, and framed by a committee of highly distinguished jurists. It was not shown that the pamphlet contained anything prejudicial to appellants. We agree with Chief Judge Duffy of the Second Circuit, who stated in *United States v. Gordon*, supra, 186, that the theory of the handbook was that "an informed juror who understood something of the proper functions of a juror could do a better and more intelligent job than one who went into the jury box with a blank mind and with none but the vaguest ideas of where a juror fitted into the federal judicial picture."

This court gave extensive consideration to the question of using the Handbook for Jurors in *Horton v. United States* and *Johnson v. United States*, companion cases reviewed in 256 F.2d 138 (C. A. 6). Contentions similar to those made herein were raised in the *Horton* case, supra, namely, that the use of the handbook is an encroachment upon the jury system and

denies appellants a fair and impartial trial. Chief Judge Simmons, speaking for the court, said:

"The challenged language of the handbook, read in context, instructs the jurors that the Judge determines the law to be applied while the jury decides the facts, that the judge declares the law to be and his law controls, that the jury must determine what are the true facts and the jurors are sworn to disregard prejudices and follow the court's instructions and they violate their oath if they render their decision on the basis of the effect their verdict might have in other situations. To say that the challenged statement impinged upon the independent judgment of the jurors would downgrade the intelligence of Federal jurors, impute lack of conscience to them, and defiance of judicial instructions and open the doors to innumerable appeals and petitions of guilty defendants tried by juries which had received the handbook. Upon such thin assumptions as are here advanced, this ought not to be done."

See also *People v. Lopez*, 32 Cal.2d 673; *United States v. Allied Stevedoring Corporation*, 258 F.2d 104, 106, 107 (C. A. 2).

[Constitutional Questions Considered]

Various constitutional questions are raised by appellant Kasper which require little discussion. Kasper claims that the injunction issued by the District Court violates the free speech provision of the First Amendment to the Constitution. As held in *Kasper v. Brittain*, supra, the right to speak is not absolute. The First Amendment does not confer the right to persuade others to violate the law, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502. Kasper's proven utterances during the incidents of November and December, 1956, like his speech of August 29, 1956, were clearly calculated to cause a violation of law and hence were not protected by the First Amendment. *Dennis v. United States*, 341 U.S. 494; *Kasper v. Brittain*, supra.

Neither was Kasper twice put in jeopardy by his second conviction of criminal contempt. The first finding of guilty grew out of Kasper's individual contempt committed on August 29, 1956. *Kasper v. Brittain*, supra. The present conviction grew out of a separate and subse-

quent contempt, consisting of Kasper's acting in concert with others to violate the permanent injunction issued September 6, 1956. One of Kasper's particular acts in violation of the permanent injunction, namely, his effort to prevent Rev. Turner from conducting the negro children to school, was done December 4, 1956.

Under the Constitution Kasper is not immune from prosecution for contempt of court committed in November and December, 1956, simply because he was found guilty of a similar contempt which occurred in August, 1956. Successive and separate contempts are punishable as separate offenses. *Jennings v. United States*, supra. Cf. *Tobin v. Piolet*, 186 F.2d 886 (C. A. 7).

Kasper also urges that he was denied the right to a speedy trial guaranteed by the Sixth Amendment because four months passed from the time the amended order of attachment issued to the time of trial. The right to a speedy trial is necessarily relative. *Beavers v. Haubert*, 198 U.S. 77. The Sixth Amendment does not guarantee an immediate trial. No prejudice and no features of arbitrary, oppressive or vexatious delay were shown. Cf. *Chinn v. United States*, 228 F.2d 151 (C. A. 4).

Futhermore Kasper contends that he was denied due process of law under the Fifth and Sixth Amendments upon the ground that the Attorney General and the Director of the Bureau of Prisons refused to transfer him from a Federal prison in Florida to a prison in or near Washington, D. C. Kasper's attorney was located in Washington and Kasper claims that this denial of transfer deprived him of effective assistance of counsel. The objection is overruled. The record shows that Kasper was effectively assisted by counsel. Also, nothing in the Constitution guarantees a prisoner serving a lawful sentence the right to be transported to another locality to be near his attorney on appeal.

[Jury Tampering from TV Alleged]

A further question presented on this appeal is the contention that the jury was tampered with by employees of a broadcasting company producing a network television program while the trial was in progress in which the foreman of the jury, Mr. Powell May, was directly involved. The facts are developed on motion for new trial which was denied by the trial court. The court had instructed the jury not to view television programs, read the papers or listen to radio ac-

counts of the case. May was invited by his next door neighbor, Mrs. Ray Carroll Jones, to come to her house and view a television broadcast in which Mr. Jones was to be shown. It does not appear that May was told the subject of the program. When questioned about the invitation May said, "I want to explain that we have no television receiver and [are] not particularly interested in television shows and knew nothing about the preparation of this particular program."

* * * We did not know who it concerned * * * These statements are not contradicted.

There is no evidence that the network secured or tried to get May's presence for the broadcast. While May failed to follow the court's instructions, there is no evidence of an intention, either upon the part of the network or of Mr. and Mrs. Jones, to influence May in the case.

Defendants claim that the subject of the broadcast was "Will a Southern Jury Convict?" A woman testified that she viewed the telecast, that the announcer said that "a Southern jury wouldn't convict anyone," and that May was identified as being on the jury.

This woman did not listen to the telecast at the home of Jones. It is undisputed that May came into the Jones home after the particular telecast had begun. May repeatedly declared under oath that the phrase "Will a Southern Jury Convict?" was not used and that that subject was not the theme of the broadcast. The fact that he went to the Jones home after the announcer had begun supports May's statement, for he well could have missed the announcement of a general theme, if any. What May saw on the screen was his next door neighbor Jones and the pastor of May's church being interviewed. The subject seemed to be May as an individual. May testified that no mention of the trial proceedings was made. Both Jones and May's pastor bore witness to May's high character and integrity. Each in effect stated that he believed May would render an honest decision in a trial.

Defendants urge that under these circumstances *Remmer v. United States*, 350 U.S. 377, holds that a presumption of prejudice exists and requires the conclusion that reversible error was established. In the *Remmer* case, supra, 380, it was shown that a private party had suggested to a juror that the defendant (one Bones Remmer) had "sold Cal-Neva for \$850,000 and really got about \$300,000 under the table which he daresn't touch. Why don't you make a deal with him?" The juror vigorously stated that he could not

talk about the case. The court consulted with the district attorney and the FBI investigated the matter, but defendant and his counsel were not apprised of the investigation. The juror was deeply distressed by the incident and stated to another juror after the trial that he had "been under a terrific pressure." The Supreme Court held that the juror had been "subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made," and held that petitioner was entitled to a new trial.

[Remmer Case Distinguished]

On the facts presented the Remmer case is plainly distinguishable from the instant case.

May was not approached with reference to the instant case. A neighborly invitation brought May over to the Jones house. Moreover, it is questionable whether the rule of the Remmer case is applicable to a public broadcast. The Remmer case presented a situation of proven tampering by private parties. Here no tampering is proved. The situation here presented arises in many instances where, as here, the jury is not confined for the duration of the trial. As Mr. Justice Holmes, speaking for the Supreme Court, declared in *Holt v. United States*, 218 U.S. 245, "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." Despite the admonitions of trial judges, many jurors read newspaper accounts or hear reports on radio and television concerning the trial in which they are serving. This fact does not of itself invalidate the verdict. Prejudice must be shown. Cf. *United States v. Catalano*, 231 F.2d 67 (C. A. 2).

[Court's Discretion Not Abused]

Although the trial court had already charged the jury in the instant case not to view television or read or listen to accounts of the trial, it recognized the frequent destruction of complete isolation that arises through radio and television for persons sitting on the jury. The court therefore charged the jury to disregard completely any impressions or information received from other sources, such as radio, television or newspaper articles. Under Fed. Rules of Cr. Proc.,

rule 33, the trial judge is vested with a wide discretion in the granting of a new trial. We think that discretion was not abused. May did not seek to view the broadcast. May's neighbor and his minister were the only persons besides the announcer who appeared on the broadcast. The neighbor was a segregationist, the minister an anti-segregationist. Each spoke in the highest terms of May's integrity and judgment. We conclude that the District Court's finding that May was not influenced by the broadcast was not clearly erroneous. It is for the judge to decide whether or not private communication is prejudicial. The same rule applies with even more force to public communication which reaches a juror without intention on the part of the broadcaster. In numerous decisions the trial judge has held that a new trial should not be had, although information that superficially appeared prejudicial was transmitted to the jury. Instances where the court held prejudice was not shown include the following: *Gicinto v. United States*, 212 F.2d 8 (C. A. 8), certiorari denied 348 U.S. 884; *United States v. Allied Stevedoring Corp.*, 241 F.2d 925 (C. A. 2), certiorari denied 353 U.S. 984 (seven jurors read account of association of defendant with another man who had been indicted for the same offense); *Reining v. United States*, 167 F.2d 362 (C. A. 5), certiorari denied 335 U.S. 830 (newspaper account reported that defendant's accomplice was dead and that he had said he would rather take his life than face prosecution); *Miller v. Commonwealth of Kentucky*, 40 F.2d 820 (C. A. 6) (newspaper articles on the trial found not inaccurate and the court held there was no prejudice). See 31 A.L.R. (2d) 417.

Briggs v. United States, 221 F.2d 636 (C. A. 6), and *Krogmann v. United States*, 225 F.2d 220, 228 (C. A. 6), are not in conflict with this decision. In each of these two cases newspaper publicity unfavorable to the defendant was read by members of the jury. Here it is contradicted that the broadcast contained no mention of appellants and no discussion of facts tending to prove their guilt or innocence of the pending contempt charge. Moreover, the court charged the jury in forcible terms to ignore any newspaper publicity or broadcasts. No person or organization attempted to tamper with the jury. The publication was not caused by improper action of any government officer. Cf. *Shepherd v. Florida*, 341 U.S. 50. The ruling here was well within the range of discretion vested in the trial

judge. In accord see *United States v. Postma*, 242 F.2d 488 (C. A. 2).

We conclude that the court's decision that May was not in any respect influenced in his verdict by reason of the television program is amply supported by the evidence.

All questions presented have been considered. We find no reversible error in the record.

The judgment is affirmed.

On Rehearing

Before ALLEN, Chief Judge, MILLER, Circuit Judge, and THORNTON, District Judge.

ALLEN Chief Judge.

Due to an ill-prepared and confusing appendix which did not use the name of Cook or any name in connection with certain statements, the opinion declared that these statements were those of Kasper. This was an error. These words were spoken by Cook.

Not all of the evidence against Kasper adduced in the second trial with reference to violation of the injunction consists of the same facts that were presented in the trial of the first contempt charge. Some of these facts were necessarily considered as background to the case but much evidence was introduced concerning Kasper's activities subsequent to his first conviction (August 31, 1956) and also to the issuance of the permanent injunction (September 6, 1956).

The jury had the whole record before it, not merely an appendix. It was entitled to infer from the facts proven that there were definite concert and conspiracy between Kasper and the other defendants convicted. For instance, when Bullock presented a petition calling for ouster of Brittain as principal of the school, several weeks after Kasper's first conviction and after the issuance of the permanent injunction, the jury could justifiably find that Bullock was carrying out the threat made by Kasper personally to Brittain to get Brittain out of the school "before the year was over or the Negroes out * * *." There is no indication in this record that Kasper abandoned this purpose during the period in controversy.

The jury was not compelled to ignore the fact that Kasper, not shown to be a resident of Tennessee, remained in Clinton in close association with the aggressive opponents of the permanent

injunction up to around December 4, 1956. The jury might rightfully conclude that Kasper's evident purpose was in concert with other defendants to continue to incite resistance to the integration order and to put out the negroes by intimidation, threats and violence. The jury knew that Kasper was in continual conference and association with the men who actually spoke the abusive words and committed the violent acts of December 4, 1956. Cook, after abuse and profanity, said to Rev. Turner, "You can't get away with this * * *. We won't let you", and physically assaulted Turner. Cook was not only the constant companion of Kasper during these three months, but the jury was entitled to find from these facts that Cook in doing these acts was carrying out Kasper's continuing purpose.

That Kasper was in the area for a long period between August and December, 1956, is proved by irrefutable evidence not denied by the witnesses. A police officer of Clinton from August through December 4, 1956, said that he had seen Kasper in town "a lot", "mostly every night" at the Southland or Ann's Cafe. He testified in detail as to the hours that he saw Kasper. Brakebill and Cook were often with him. To the question concerning the months when this happened the police officer answered, "since this trouble started around August, on up." He described meetings that were held by the group and said that they occurred once a week from August to December 4.

Kasper did not take the stand in the instant proceeding. He testified in the hearing on the contempt phase of the proceedings of August 30 and 31, 1956. The District Court in its decision [August 31, 1956] in discussing the question whether Kasper wilfully violated the injunction order, said that it was Kasper's object "stated more than once", "to get Mr. Brittain out because he was doing his duty" and that "he was going to stay in Anderson County until the Negroes were thrown out or put out." This finding was supported by the evidence. Moreover, Kasper in his testimony admitted telling a reporter that he was "going to remain there and help these fellows on the picket line to keep on organizing and distributing legal literature."

We conclude that under this record the evidence was sufficient to support a finding by the jury that Kasper was in the area around December 4.

The court adheres to its original conclusion. The petition for rehearing is denied.

EDUCATION

Public Schools—Virginia (Arlington)

E. Leslie HAMM, Jr., an infant, by E. Leslie Hamm, Sr., his father and next friend et al. v. COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, and Ray E. Reid, Division Superintendent of Schools, Arlington County, Virginia.

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, and Ray E. Reid, Division Superintendent of Schools, Arlington County, Virginia, v. Ronald DESKINS, Michael Gerard Jones, Lance Dwight Newman, and Gloria Delores Thompson.

United States Court of Appeals, Fourth Circuit, March 19, 1959, No. 7776, 264 F.2d 945.

SUMMARY: In a class action in federal district court, Negro school children in Arlington County, Virginia, obtained an injunction against school officials, requiring their admission to schools without discrimination on the basis of race. *Thompson v. County School Board of Arlington County*, 144 F.Supp. 239, 1 Race Rel. L. Rep. 890 (E.D. Va. 1956). The Court of Appeals for the Fourth Circuit affirmed, holding in part that the Virginia Pupil Placement Act (1 Race Rel. L. Rep. 58, 1109) was inapplicable in the case. 240 F.2d 59, 2 Race Rel. L. Rep. 59 (1956); *cert. denied*, 353 U.S. 910, 2 Race Rel. L. Rep. 300 (1957). Subsequently, the district court amended the decree so as to require admission of all school children on a racially non-discriminatory basis beginning in September, 1957, but denied a motion to suspend the operation of the injunction pending a ruling by the Supreme Court on another case involving the constitutionality of the Pupil Placement Act. 2 Race Rel. L. Rep. 810 (1957). Thereafter, seven Negro pupils were denied admission to previously "white" schools because they had failed to apply to the state Pupil Placement Board for transfer. The Negroes then moved for further relief and for enforcement of the court's order. The court directed admission to the schools applied for by September 23, 1957, stating that the admission of the pupils to public schools could not be denied on the basis of a failure to comply with the Pupil Placement Act. The injunction was, however, suspended pending appeal. 159 F.Supp. 567, 2 Race Rel. L. Rep. 987 (E.D. Va. 1957). The Court of Appeals for the Fourth Circuit affirmed, stating that the order was "clearly proper," 252 F.2d 929, 3 Race Rel. L. Rep. 187. This decision came too late, however, to affect the 1957-58 school term. In the summer of 1958, 30 Negro students sought transfer to "white" schools. The state Pupil Placement Board denied all the transfers, citing various provisions of the placement act. The federal district court reviewed this action and found that in 26 of the cases, it could not be said the transfers were refused without substantial supporting evidence. In four other cases there was no evidence found to support a refusal to transfer, and admission was ordered. Because the school term had already started, the court delayed the effective date of the order until mid-term. 166 F.Supp. 529, 3 Race Rel. L. Rep. 931 (E.D. Va. 1958). The Court of Appeals for the Fourth Circuit affirmed the judgment as to the four ordered admitted, directing the mandate of the court to issue forthwith, but it deferred further consideration of the 26 remaining applications. 263 F.2d 226, 4 Race Rel. L. Rep. 36 (4th Cir. 1959). Subsequently, the Fourth Circuit Court of Appeals pointed out that the 26 remaining applicants had been subjected to tests not applied to white students requesting transfers, and also that, in rejecting these applications at a time when state statutes authorized the closing of integrated schools, neither the county school board nor the district court could act with the same independence with which they could now act, those statutes having being invalidated [see *Harrison v. Day*, 200 Va. 439, 106 S.E.2d 636, 4 Race Rel. L. Rep. 65 (1959) and *James v. Almond*, 170 F.Supp. 331, 4 Race Rel. L. Rep. 45 (E.D. Va. 1959)]. The court therefore remanded the case as to the 26, with direction to issue an injunction ordering the county school board to re-examine their applications expeditiously so that if any of those applications should again be denied, such action might be reviewed by the district court (if requested) prior to the opening of the 1959-60 school year, if possible.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

PER CURIAM.

In our opinion in this case, filed January 23, 1959, 263 F.2d 226, we disposed of the appeal insofar as four Negro students were concerned by affirming as to them the judgment of the District Judge, directing their immediate admission into the Stratford Junior High School in Arlington County, Virginia. We held for further examination and study the cases of twenty-six additional Negro students as to whom the denial of transfers to white schools by the County School Board of Arlington County was approved by the District Judge. We find evidence in the record that their applications for transfer were subject to tests that were not applied to the applications of white students asking transfers. Furthermore, we note that when their applications were under consideration by the County School Board, and later when the actions of the Board were reviewed by the District Judge, all of the interested parties and officials were fully conscious that if any Negro students should be admitted to a white school in the county the school would be closed under the authority of State statutes that were being given effect by the school authorities under the direction of the executive and law officers of the State.

With this threat hanging over them neither the County School Board nor the District Court could act with the same freedom and independence as they can now act since the decision of the Supreme Court of Virginia in *Harrison v. Day*, 200 Va. 439, 106 S.E.2d 636, on January 19, 1959, and the decision of the three judge United States District Court in *James v. Almond*, 170 F.Supp. 331, on the same day, in which these statutes were held invalid. For these reasons it is our conclusion that the actions of the County School Board and of the District Court in rejecting the applications of the twenty-six Negro students should not be accepted as valid precedents for future action and that as to them the case be remanded with direction to issue an injunction directing the County School Board to re-examine the applications with expedition so that such applications as may be granted may be given effect, and such applications as may be refused may be reviewed by the District Court if review is requested, prior to the opening of the 1959-60 school year, if it is possible to do so, the District Court meanwhile retaining jurisdiction of the case.

Remanded for further proceedings.

EDUCATION

Public Schools—Virginia (Prince Edward County)

Ulysses ALLEN, an infant, by Hal Edward Allen, his father and next friend, et al. v. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, et al.

United States Court of Appeals, Fourth Circuit, May 5, 1959, 266 F.2d 507.

SUMMARY: One of the original *School Segregation Cases* (1 Race Rel. L. Rep. 5, 11) was returned with the mandate of the United States Supreme Court to the federal district court in Virginia. On the remand, the three-judge district court entered a decree requiring the admission of Negro children to schools in Prince Edward County, Virginia, without discrimination on the basis of race, and with all deliberate speed. *Davis v. School Board of Prince Edward County*, 1 Race Rel. L. Rep. 82 (E.D. Va. 1955). The plaintiffs then moved for the fixing of a definite time for desegregation of the county schools. Prior to action on these motions, the original three-judge court dissolved itself and turned over the supervision of the case to a single judge. 142 F.Supp. 616, 1 Race Rel. L. Rep. 1055 (1956). The defendants then filed a motion for dismissal of the case on the ground that recently-enacted Virginia legislation had provided an adequate state remedy for the plaintiffs. After hearings, the district court held that the plaintiffs would not be required to exhaust the state remedies but that present conditions in the county, including public opinion unfavorable to desegregation, required that it defer an order requiring desegregation. 149 F.Supp. 431,

2 Race Rel. L. Rep. 341 (1957). The Court of Appeals for the Fourth Circuit reversed and remanded the case with directions to the district court to enter a decree requiring the abolition of racial discrimination in school admission policies "without further delay." After a hearing at which evidence of the deterioration of race relations in the county was submitted, and plans to conduct a survey of the county's school problems were disclosed, the district court fixed ten years following the 1955 decision in the *Brown* case as the time for compliance. The court ordered preliminary steps toward the formulation of a plan of compliance meanwhile, directed defendants to report their progress on or before January 1, 1959, and reserved the power to accelerate or extend the date of compliance should the interest of the parties or the public call for it. 164 F.Supp. 786, 3 Race Rel. L. Rep. 964 (E.D. Va. 1958). On appeal, the Fourth Circuit again reversed and remanded on the ground that plaintiffs' constitutional rights were not to be yielded because of race relations deterioration nor the probability of violence if precipitate action were taken. It was observed that recognition of the particular problems of a rural county where the races are practically equal in number had already been given effect in this case, but that defendants had taken no action during the four years since the *School Segregation Cases* were decided and were contemplating none. In order to give effect to the Supreme Court's mandate, the district judge was directed to issue an order enjoining defendants from any action regulating on the basis of color the admission, enrollment, or education of Negro children in county high schools; requiring them to consider applications of Negro children for admission to the "white" high school on a non-racial basis so as to permit entrance therein in September, 1959; and requiring them to make plans for admitting pupils to elementary schools on a non-racial basis and to receive and consider applications to that end "at the earliest practical day." The order also directed that state pupil assignment laws are to be observed so long as they do not cause racial discrimination, that administrative remedies therein specified must be exhausted by plaintiffs before applying for judicial relief on the ground of an alleged injunction violation, and that jurisdiction be retained for such further action as may be necessary.

Before SOPER and HAYNSWORTH, Circuit Judges, and THOMPSON, District Judge.

PER CURIAM.

This litigation, which looks to the desegregation of the races in the public schools of Prince Edward County, Virginia, began nearly nine years ago on May 23, 1951, when a class suit on behalf of a number of colored pupils of high school age was entered against the County School Board in the District Court below. Since that time the case has been continuously before the courts and the principle of desegregation has been firmly established, but no steps to bring it about in the County have been taken by the school authorities. The last order of the District Court, from which this appeal was taken, was issued November 26, 1958, and therein the School Board was directed to proceed promptly with the formulation of a plan of desegregation and to report the progress made in the formulation of the plan to the court on or before January 1, 1959.¹ But by the same order the school

authorities were given seven additional years, until the beginning of the 1965 school year, to put the plan into operation unless the order should be modified in the meantime. This date was fixed because the judge was of the opinion that the School Board should have ten years from the second decision of the Supreme Court in *Brown v. Board of Education* on May 31, 1955 (349 U.S. 249) in which to give effect to its mandate that the plaintiffs be admitted to the public schools of the County on a racially non-discriminatory basis with all deliberate speed.

[Case History Reviewed]

The question on this appeal, in view of the proceedings which have already taken place, is whether this order of the District Court conforms to the requirements which the Supreme Court has laid down. The original complaint was based on the proposition that the segregation of the races in the public schools of a state is a violation of the Federal Constitution and upon the further ground that if segregation accompanied by equality of treatment is valid the

1. We were informed at the argument of this appeal that the County School Board has reported that it has employed an expert to advise it as to the situation in the schools of the County.

facilities afforded the colored pupils in the public schools of Prince Edward County were grossly inferior to those furnished to the white pupils. In reply the School Board contended that segregation if properly administered is valid, but admitted that the facilities furnished Negro pupils were inferior and stated that prompt steps to bring about equality at an early date were being taken. After hearing the case the three-judge court rendered an opinion on March 7, 1952, in which it upheld the first defense in principle but ordered that the School Board pursue with diligence and dispatch their program to replace the old facilities furnished Negro pupils and remove the inequality. 103 F.Supp. 337.²

An appeal from this decision was taken to the Supreme Court of the United States and the case was one of the group which was decided by the Court in *Brown v. Board of Education*, 347 U.S. 483, on May 17, 1954, and *Brown v. Board of Education*, 349 U.S. 294, on May 31, 1955. Thereby the decision of the three-judge court was reversed and the case was remanded for further proceedings as indicated above. Upon the remand the three-judge court, on July 18, 1955, ordered compliance with the mandate of the Supreme Court but found that it was impracticable to effect the change in the schools of the County for the school year beginning in September 1955, and retained jurisdiction for further consideration and action.³

Thereafter, on April 23, 1956, the plaintiffs moved the court to comply with the mandate of the Supreme Court as to the secondary schools of the County not later than the school term beginning September 1956. Accordingly, the three-judge court was reconvened but, since the constitutional questions involved in the case had been conclusively determined, it was ordered that the court be dissolved and that further proceedings in the case be directed by United States District Judge Hutcheson. 142 F.Supp. 616. In subsequent proceedings before the single District Judge, consideration was given to the plaintiffs' prayer for further relief and also to an answer of the defendants resisting such relief,

and a motion of the defendants that the plaintiffs' case be dismissed on the ground that an adequate remedy had been furnished them by certain acts of the Legislature of Virginia, passed at its session of 1956, and praying that the three-judge court be reconvened to consider this new phase of the case.⁴

The District Judge disposed of these motions in an opinion filed on January 23, 1957, 149 F.Supp. 431, which was followed by an order of March 26, 1957, in which the decision on the motion of the plaintiffs for further relief was withheld with reservation to the plaintiffs of the right to renew the motion at a later date after the defendants had been afforded a reasonable time to effect a solution. By the same order the judge denied the motion of the defendants that a three-judge court be convened but declined to pass on the matters raised in the defendants' motion to dismiss.

An appeal was taken from this decision and it was reversed by this Court on November 11, 1957, 249 F.2d 462, wherein the case was remanded to the District Court with direction to enter an order directing the defendants to make a prompt and reasonable start toward complying with the court's order enjoining discrimination on the ground of race or color in admitting children to the schools under the supervision of the County School Board. The attention of the District Court was called to the order passed by this court on December 31, 1956, in *County School Board of Arlington County v. Thompson*, 240 F.2d 59, wherein an order enjoining the County School Board of Arlington County to begin the desegregation of the elementary schools of the County in the 1956-57 term and the high school in the 1957-58 term was approved. It was there pointed out that it had been two years since the first decision of the Supreme Court in *Brown v. Board of Education* and that the County School Board, despite repeated demands, had taken no steps to remove the requirement of segregation in the schools. In that case (page 64) we said:

"* * * This was not 'deliberate speed' in complying with the law as laid down by the Supreme Court but was clear manifestation of an attitude of intransigence, which justified the issuance of the injunctions to

2. A new building for Negro pupils has since been erected.

3. At this time an intervening complaint was filed in the case by the parents of Negro children of high school age which adopted all of the allegations of the original complaint and pointed out that they had not completed their course of instruction in the public elementary schools when the suit was filed.

4. The acts of the Legislature of Virginia of 1956 relating to the public schools of the state were considered by a three-judge court in *James v. Almond*, D.C., E.D.Va., 170 F.Supp. 331.

dispel the misapprehension of school authorities as to their obligations under the law and to bring about their prompt compliance with constitutional requirements as interpreted by the Supreme Court."

After this quotation from the Arlington County case we used the following language with respect to the delay of the school authorities of Prince Edward County (249 F.2d 462 at 465) in the case now under consideration:

"In the case at bar the order entered on June 29, 1955, while finding that it was impracticable to place the schools on a non-discriminatory basis before September 1955, enjoined the defendants 'from refusing on account of race or color to admit to any school under their supervision any child qualified to enter such school, from and after such time as the defendants may have made the necessary arrangements for admission of children to such school on a non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this cause.' More than a year and a half had elapsed after the entry of this order, the school year of 1955-56 had come and gone, another school year had been entered, and no steps had been taken to comply with the order. The time had unquestionably come to say plainly to the defendants that they must comply without further delay."

The response of the District Judge to this last decision of this court in the pending case was to allow the County School Board of Prince Edward County the additional period of seven years within which to integrate the schools of the county. So far as can be gleaned from the opinion of the District Judge, the reasons which guided him in prolonging the period of inactivity and deferring integration in the public schools until 1965 were the findings that racial relations in the County had deteriorated in a marked degree since the first decision of the Supreme Court in 1954 and that violence may be within the realm of probability if precipitate action is taken, and that it is against the interests of immature school children that they should be psychologically disturbed by such conditions. In the course of the opinion reference was made, with approval, to the decision of the

District Judge in *Aaron v. Cooper*—known as the Little Rock Case—163 F.Supp. 13, decided June 20, 1958, wherein a plan for gradual racial integration of public schools in Little Rock which had been adopted by the school board was suspended until the 1960-61 school year because of popular opposition marked by incidents of more or less serious violence against Negro students and their property. With this decision in mind the judge in the pending case reached the conclusion that the School Board of Prince Edward County might defer action until 1965.

[District Court Order Disapproved]

The proceedings of the District Court outlined above and the total inaction of the School Board speak so loudly that no argument is needed to show that the last delaying order of the District Judge cannot be approved, and that it has become necessary for this Court to give specific directions as to what must be done. This becomes even more clear in view of the decision of the Supreme Court of the United States on September 29, 1958, in *Cooper v. Aaron*, 358 U.S. 1, wherein the order of the United States District Court for the Eastern District of Arkansas suspending the integration plan adopted by the local school board was reversed. The Supreme Court said, pages 16 and 17:

"The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in an unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.' *Buchanan v. Warley*, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights." * * *

* * * In short, the constitutional rights of children not to be discriminated against

in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' *Smith v. Texas*, 311 U.S. 128, 132."

[Rural Problems Already Considered]

We are advertent to the fact that the problems which confront a school board in a municipality are different from those which the school board must meet in a completely rural community such as Prince Edward County where the races are approximately equal in number. This difference, however, has already been given effect in the present instance. Other communities in the state have taken steps to meet the question and solve it, whereas in Prince Edward County the school authorities have taken no effective action whatsoever during the four years since the second decision in *Brown v. Board of Education* was rendered, and even today contemplate no action in the future. Under these circumstances it is incumbent upon this Court to take steps to give effect to the mandate of the Supreme Court of the United States.

[Reversed and Remanded]

The order of the District Court in the pending case will therefore be reversed and the case remanded with direction that the District Judge issue an order enjoining the defendants from any action that regulates or affects on the basis of color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County; and requiring the defendants to receive and consider the applications of such persons for admission to the white high school of the County on a non-racial basis without regard to race or color; and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white school in the school term beginning September 1959; and also requiring the School Board to make plans for the admis-

sion of pupils in the elementary schools of the County without regard to race and to receive and consider applications to this end at the earliest practical day. The order of the District Judge shall also provide that state laws as to the assignment of pupils to classes in the public schools of the County shall be observed so long as such laws do not cause discrimination based on race or color, and that the administrative remedies therein provided must be exhausted before application is made to the court for relief on the ground that its injunction is being violated; and the order shall further provide that the suit remain upon the docket of the court and that the court retain jurisdiction thereof for such further action as may be necessary, including the power to enlarge, reduce or otherwise modify the provisions of the decree.

[Additional Costs Allowed]

The plaintiffs make the additional contention that they should be allowed as part of the costs of the original hearing certain sums expended by them for the employment of expert witnesses, the procurement of photographs and the additional cost of daily transcript of the testimony which the District Judge disallowed. So far as the expense of the expert testimony and the photographs is concerned, reference is made to the allowance of items of this character to the prevailing parties in various patent cases. In respect to these items, we think the judgment of the District Court should be affirmed. The case was an important one from the standpoint of both parties and the propriety of making a full presentation cannot be doubted. However, much of the expense of these items was incurred in order to show that the schools provided for the Negro pupils were inferior to the white schools and this charge was admitted in the answer of the defendants so that the expenses incurred, although useful, were hardly essential. We think, however, that the additional expense incurred by the plaintiffs for daily copy of the transcript of the testimony should be allowed. The proposal to have daily copy of the testimony was first made by the defendants, and it was well-nigh essential for the plaintiffs to try the case on an equal footing with their opponents. The ordinary costs of the transcript of the testimony are usually borne by the losing party and it would seem that the same rule should be applied in the case like the present, in which the

parties agreed at the outset that daily copy should be provided. The judgment of the District Court will therefore be amended to make

this additional allowance of costs to the plaintiffs. Let the mandate issue forthwith.

Reversed and Remanded.

EDUCATION

Colleges and Universities—Texas

H. L. HEATON et al. v. Lena Ann BRISTOL et al.

Court of Civil Appeals of Texas, Waco, October 2, 1958, 317 S.E.2d 86.

SUMMARY: Certain women residing in the vicinity of the Agricultural and Mechanical College of Texas were refused admission thereto because of their sex, pursuant to an 80 year old practice and a resolution of the College Board of Directors, in force since 1925, excluding females as students. Applicants then obtained from a Texas state court an order declaring them eligible for enrollment, and a writ of mandamus directing defendant college officials to admit them. The court held that the exclusion of women from the college was in violation of the equal protection clause of the Fourteenth Amendment, because, "As a matter of law separate but equal facilities are inherently unequal as applied to males and females for educational purposes." The court also pointed out that certain courses, such as veterinary medicine, were offered in Texas only at this college and held the grant-of-tuition procedure for sending Texas female citizens out of state for such training clearly violated the equal protection clause. In addition, the court held that as the college was established and received benefits under the Federal Land Grant College Act, which required indiscriminate education of the industrial classes, the exclusionary policy violated the privileges and immunities clause of the Fourteenth Amendment. The Texas Court of Civil Appeals reversed, rendering judgment for defendants. This court reasoned that equal protection had not been denied, since plaintiffs had been treated no differently from other female Texans, who could choose from the state's 16 co-educational institutions and one college for women, which offer the "widest range of subjects." It was also pointed out that since drastic, expensive changes in both the college's physical equipment and educational program would be required to accommodate female students, sex was a reasonable basis for classification in this situation. The court further held that the privileges and immunities clause had not been violated, the Land Grant Act being silent as to the sex of students to be admitted to Land Grant Colleges and specifying only certain courses to be taught "in such manner as the legislatures of the States may respectively prescribe." The United States Supreme Court denied certiorari 79 S.Ct. 802, 4 Race Rel. L. Rep. 12, and also denied rehearing 79 S.Ct. 1123, 4 Race Rel. L. Rep. 251 (1959). Excerpts from the Texas court opinions on constitutional issues follow:

Appellants' 3rd Point is that the trial court erred in holding that the exclusion of appellees from the Agricultural and Mechanical College of Texas was violative of their constitutional rights. We sustain this contention for reasons which we shall hereafter briefly state.

This record is without dispute that appellees wished to enter the College principally upon the ground that they were citizens of the community in which it was located and that it would be more convenient for them and less expensive than to go elsewhere to pursue their educational

desires. The record is without dispute that appellees could have pursued their education at other State supported institutions.

As we understand the appellees' position here, as well as the holding of the trial court, it is that the exclusion of appellees from the College was in violation of the equal protection clause in the 14th Amendment of the Constitution of the United States, and of the privileges and immunities clause in the Amendment, and likewise violative of both Sections 3 and 19 of Article I of the Constitution of Texas, Vernon's Ann.St.

We have carefully reviewed the foregoing provisions of our Federal Constitution and that of our State Constitution and we cannot agree with appellees' contentions. The record here shows that the College is one of seven State supported military colleges in the United States. It is the only State supported military college in the State of Texas. The military program at A. & M. differs from the Reserve Officer's Training Program offered at various other state colleges and universities in a number of material respects. The participants in the military program at A. & M. are organized on a corps basis; the men are organized into military units, and they are constantly under military discipline twenty-four hours a day, seven days a week. It is true that the record shows that in previous years military science and tactics was not required of the students at A. & M., and that said course or courses are on a voluntary basis and that this condition has existed for the past three or four years. However, the record does disclose that beginning with the Regular Session in September 1958 the College, by order of the Board of Directors, will require two years of military training by every able-bodied student. The record also discloses that military training was in effect at the College from 1876 to 1954, when the Board of Directors made the training voluntary on a trial basis. Therefore, the restoration of the compulsory military training represents nothing more than a return to a long observed policy. The trial court was and is concerned only with the actions of the present Board and its regulations. Testimony was also tendered to the effect that Dr. Harrington, President of the College, was of the view that the enrollment projection for the College would reach 13,000 by 1970, and this projection was made on the assumption that the College would remain all military; that present facilities available for instructional purposes are sufficient to accommodate 7,500 to 7,600 students; that there were 7,474 male students enrolled on October 15, 1957; that the majority of the dormitories are built like barracks with common toilet facilities and therefore not adaptable to occupancy by women students. The foregoing uncontroverted factual situation illustrates the drastic reorganization of the college facilities which would be necessary in order to carry out the judicial decree requiring the admission of women students. The judgment does not suggest how the Board of Directors can proceed to resolve the vexing problems of

the College which the admission of women students would create. It is obvious there would have to be much planning and new appropriations made by the Legislature in order to carry out the trial court's decree. Neither counsel for appellants nor appellees have pointed out any case wherein an appellate court of any jurisdiction has at any time held, or even intimated, that a state cannot, as a part of its over-all educational system, maintain one all-male or one all-female university as the Legislature has done in Texas for our higher educational system. There is certainly not even the remotest suggestion by inference or otherwise in any of the reported cases that the system now maintained by Texas constitutes a violation of any constitutional provisions, State or Federal.

[Texas Higher Education]

The Texas system of higher education, as it exists today, is comprised of 18 institutions fully supported by State funds. Each of these institutions, with the exception of A. & M. and Texas Women's University, is open to both sexes and has remained open to qualified members of each sex since the date of founding. A. & M. is only one part of the whole system, just as Texas Women's University is just a single part of the same system, along with the University of Texas and the other State colleges. No single college or university was established to serve the full and varied academic needs of the State, but the system, which includes each individual institution, fulfilling the respective objects of its creation, has been established to meet and fill the total and diverse educational needs of the State. So we must view the system as a whole in order to ascertain whether there is discrimination between the sexes, the entire system must be viewed, and not a single institution standing alone. This record shows that the system does not discriminate but makes ample and substantially equal provision for the education of both sexes. The Legislature in its wisdom has seen fit to afford to the individual the widest possible choice in the selection of a college or university. There are 16 co-educational institutions, offering the widest range of subjects, for the choice of those desiring the academic and social environment supplied by such institutions. There is one institution which offers an all-male environment, and one which offers an all-female environment. We think the foregoing shows conclusively that appellees' exclusion from the

College was not violative of any of their constitutional rights. It is obvious that appellees, being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State supported college or university. The location of any such institution must necessarily inure to the benefit of some and to the detriment of others, depending upon the distance the affected individuals reside from the institution.

[Sex as Classification Basis]

Moreover, sex, as a basis for legislative classification, is used with considerable frequency in both the statutes of the United States and of the several states. The range of this legislation covers such diverse subjects as jury service, voting rights, employment in certain pursuits, minimum wage and hour legislation and property rights. See 16A C.J.S. Constitutional Law § 544, pp. 480-481; 2 Stanford Law Review 726; State v. Baker, 50 Or. 381, 92 P. 1076, 13 L.R.A.,N.S., 1040; State v. Hunter, 208 Or. 282, 300 P.2d 455; West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703; Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940; Radice v. New York, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690; Quong Wing v. Kirkendall, 223 U.S. 59, 32 S.Ct. 192, 56 L.Ed. 350; Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551; Riley v. Massachusetts, 232 U.S. 671, 34 S.Ct. 469, 58 L.Ed. 788; Miller v. Wilson, 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628; Bosley v. McLaughlin, 236 U.S. 385, 35 S.Ct. 345, 59 L.Ed. 632; Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S.W. 556, 561.

In the Middleton v. Texas Power & Light Company case our Supreme Court said: "Classification for the purpose of a law is a legislative function. It will be sustained by the courts unless it is wholly without any reasonable basis."

In Mumme v. Marrs, 120 Tex. 383, 40 S.W.2d 31, 36, our Supreme Court had before it the constitutionality of the public school rural aid bill, which was challenged on the ground that it violated Sections 3 and 19 of Article I, Constitution of Texas. The court in its opinion pointed out that Section I of Article VII of our State Constitution directed the Legislature to "make suitable provision for the support and maintenance of an efficient system of public free schools." In the opinion we find this statement:

"* * * it necessarily follows that it (the Legislature) has a choice in the selection of methods by which the object of the organic law may be effectuated. The Legislature alone is to judge what means are necessary and appropriate for a purpose which the Constitution makes legitimate * * *"

[Burden of Proof]

Moreover, it was incumbent upon the appellees in this cause to bear the burden of showing the unconstitutionality of the discretionary authority vested in the Board of Directors. This we think they wholly failed to do. The applicable rule of law is stated in 9 Tex.Jur., under Statutes, page 479, which we quote in part:

"A statute should not be annulled merely because doubt may be suggested as to its constitutionality. On the contrary, where the judicial conscience is uncertain or doubtful as to whether the act is in conflict with the constitution, the rule is to hold the legislation valid and effectual, all doubts being resolved in favor of the challenged statute. In such circumstances it is due to the legislative branch of the government that its action be upheld and its decision accepted by the judicial department."

See Ex parte George, Tex.Cr.App., 215 S.W.2d 170.

[Sex Equality Recognized]

Finally, we think the controlling question with reference to the above matter is whether the State, as a matter of public policy, may as a part of its total system of higher education, maintain, for the choice and service of its citizens, one all-male and one all-female institution, along with sixteen institutions which are co-educational. We think undoubtedly the answer is Yes. Such a plan exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefits of the best, most varied system of higher education that the State can supply.

[Privileges and Immunities]

Appellees contend and the trial court found in effect that by accepting the benefits of the Land Grant Act (Acts July 2, 1862, Chapter 130, as amended, Act March 3, 1883, Chapter 102,

7 U.S.C.A. § 301 et seq.) the State thereby assumed the obligation to permit the enrollment of both sexes at the Agricultural and Mechanical College, and hence the exclusion of appellees from the College violates the privileges and immunities clause of the 14th Amendment to the Constitution of the United States. We overrule this contention.

Section 4 of the Land Grant Act, among other things, prescribed the leading courses to be taught at the Land Grant institutions "in such

manner as the legislatures of the States may respectively prescribe." The Act is silent on the question of what sexes are to be admitted to such institutions. The grants made by the act are to the respective states and not to any institution established by the state. See *State of Wyoming ex rel. Wyoming Agricultural College v. Irvine*, 206 U.S. 278, 27 S.Ct. 613, 51 L.Ed. 1063. See also *Hamilton v. Regents of the University of California*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343.

EDUCATION

Private Schools—California

Cynthia Denice REED etc. v. HOLLYWOOD PROFESSIONAL SCHOOL, et al.

Superior Court, Appellate Department, County of Los Angeles, State of California, April 13, 1959, 338 P.2d 633.

SUMMARY: A suit was brought in Los Angeles Municipal Court in behalf of a five-year-old Negro girl against a private school which allegedly had refused to enroll plaintiff solely because she was a Negro. Damages were claimed for violation of plaintiff's civil rights under California statutes forbidding racial discrimination in "all other places of public accommodation or amusement." It was contended also that the school is public in the sense that the state may regulate certain phases of its operation under the police power, and that members of the public are invited to attend solely for the school's financial support. From an order and judgment of nonsuit, plaintiff appealed. The Appellate Department of the Superior Court of Los Angeles rejected the contention that the school is public as specious, in view of the fact that it had been stipulated to be private at the trial. It was further held that a private school is not a place of "public accommodation or amusement" under the terms of the statutes invoked, that language being construed to apply rather to businesses such as public service corporations and to those serving a general public purpose, those in which the public accommodation or amusement was public property, and those exercising a public function. The judgment and order were affirmed.

HULS, Judge.

Appeal by plaintiff from order and judgment of nonsuit, of the Municipal Court of the Los Angeles Judicial District, Vernon W. Hunt, Judge. Affirmed.

• • •

Plaintiff, a five-year-old negro girl, by her guardian ad litem, appeals from the order and judgment of nonsuit; she claimed damages for violation of her civil rights under the provisions of Civil Code secs. 51, 52, 53 and 54, because of defendant's refusal to enroll her in defendant's school by reason of the fact that she was a negro,

and that she was discriminated against solely because she was a member of that race. At the trial it was stipulated that defendant is and always has been a private school.

Plaintiff contends that a private school is within the meaning of the words "all other places of public accommodation or amusement" in Civil Code sec. 51, and that such denial creates a liability under the provisions of Civil Code secs. 51, 52, 53 and 54. Since sections 53 and 54 by their terms apply only to a person over the age of twenty-one years, they have no application here.

The evidence clearly shows that the owner of

the defendant school told the guardian ad litem of the minor plaintiff that he could not admit negroes, although a brochure from the school had been received by the guardian's wife, upon which she phoned the school for information.

[A "Public" School?]

Appellant contends further that the school is public in the sense that the state may regulate certain phases of it under the police power, involving a violation of civil rights because of race; further that the defendant school invites members of the public to attend and solely for financial support of the school. In view of the stipulation, these contentions are specious. It should be noted, also, that a system of common schools is required by the California Constitution by which a "free" school shall be kept up and supported by the legislature (Constitution Article IX, sec. 5). The lawful existence of private schools is recognized, among other things, by a special exemption in the compulsory education law. 44 Cal.Jur.2d 134, sec. 428; Education Code sec. 16624. *Piper v. Big Pine School Dist.* (1924), 193 Cal. 664, 674. By article IX, section 1, of the state constitution, the advantages and necessities of a universally educated people as a guarantee and means for the preservation of the rights and liberties of the people has been declared: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." (emphasis ours) *Piper v. Big Pines School Dist.*, supra, p. 668.

The legislature has provided for a system of common schools (Education Code). The education of the children of the state is protected and safeguarded by a state board of education. *Piper v. Big Pines School Dist.*, supra, p. 669. "The enjoyment of these privileges are enforceable rights vouchsafed to all who have a legal right to attend the public schools which cannot be enjoyed as a matter of right by those who, from choice or compulsion, attend schools without the control, supervision and regulation of the education departments of the state." (p. 669).

The legislature, in our opinion, has not expressly provided for these safeguards of education to those attending the private schools in the state, who are "exempted" by Education

Code sec. 16624 from attendance in the public schools. The only requirements are that such schools shall be taught in the English language, instruction in the several branches of study required in the public schools, the keeping of attendance records, the hours of attendance, and that the tutor or other person shall hold the proper valid state credential. (Education Code sec. 16624-5). *Roman Cath. etc. Corp. v. City of Piedmont* (1955), 45 Cal.2d 325, 333. "Parents have the right to send their children to private schools, rather than public ones . . ." *Roman Cath. etc. Corp. v. City of Piedmont*, supra, p. 330. *People v. Turner* (1953), 121 Cal.App.2d Supp. 861, 865.

[Place of "Public Accommodation"?

But beyond these legislative requirements and those upheld by our courts as just referred to, they have not gone. Therefore, the question is whether a private school is one of the "other places of public accommodation or amusement" within the meaning of Civil Code secs. 51 or 52.

The California cases cited by appellant were under our civil rights statutes, and those of other jurisdictions under similar statutes. The businesses referred to therein obviously were places of public accommodation or amusement similar to the expressly named places and of a similar kind of public accommodation or amusement.

The settled rule of law is that the expression "all other places" means all other places of a like nature to those enumerated. *Long v. Mountain View Cemetery Assn.* (1955), 130 Cal.App. 2d 328. While we have said that Civil Code sec. 51 "is to be given a liberal, not a strict, construction . . . this sweeping language [of the statute] does not cover 'all places', however." *Lambert v. Mandel's of California* (1957), 156 Cal.App.2d Supp. 855, 856-857, citing *Long v. Mountain View Cemetery Assn.*, supra, and *Coleman v. Middlestaff* (1957), 147 Cal.App.2d Supp. 833, 834-5. "The general intent and significance of the foregoing provisions are clear enough. The purpose, of course, is to compel a recognition of the equality of citizens in the right to the peculiar service afforded by these agencies for the accommodation and entertainment of the public." *Stone v. Board of Directors of Pasadena* (1941), 47 Cal.App.2d 749, 753.

[*Private School not Public Accommodation*]

In the court's opinion a private school is not a place of public accommodation or amusement, nor it is a public place of amusement or accommodation, within the meaning of Civil Code secs. 51 or 52. It is true that racial discrimination in public education is unconstitutional. *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483, 98 L.Ed. 873; *Lucy v. Adams* (1955), 350 U.S. 1, 100 L.Ed. 3. See also 32 A.G. (1959), 264, 268. Rights of racial minorities have gradually been extended. *James v. Marinship Corp.* (1944), 25 Cal.2d 721 (discrimination by labor unions against negroes); *Thompson v. Moore Drydock Co.* (1946), 27 Cal.2d 595 (labor union); *Williams v. International Brotherhood of Boilermakers* (1946), 27 Cal.2d 586 (same); *Perez v. Sharp* (1948), 32 Cal.2d 711 (miscegenation); *Banks v. Housing Authority* (1953), 120 Cal.App.2d 1, certiorari denied by U.S. Supreme Court, 347 U.S. 974, 98 L.Ed. 1114. In general the extension of such rights has been based upon the discrimination exercised in business such as public service corporations or serving a general public purpose or where the public accommodation or amusement was public property or was being used in the exercise of a public function. The civil rights statutes have not been applied in the case of private or semi-private uses. 9 A.G. 271, 272. It was early decided that a negro was not denied any constitutional right by refusal of a private education institution to admit him, apparently on the ground that the constitutional guarantees apply to state action rather than to private action. *State ex rel. Clark v. Maryland Inst. for Promotion of Mechanic Arts* (1898), 87 Md. 643, 41 Atl. 128. *Booker v. Grand Rapids Medical College* (1909), 156 Mich. 95, 120 N.W. 589, 24 L.R.A.(NS) 447, 10 Am.Jur. 910; *Kirkpatrick v. Williams* (1949), 53 N.Mex. 477, 211 Pac.2d 506, 507; see 55 Am.Jur. 11, sec. 15; 10 Am.Jur. 909-910. Likewise in a review of state action the Supreme Court has held that it is invalid for courts to enforce restrictive covenants in deeds either by injunction or in actions for damages. *Shelley v. Kraemer* (1948), 334 U.S. 1, 92 L.Ed. 1161; *Barrows v. Jackson* (1953), 346 U.S. 249, 97 L.Ed. 1586. Schools organized pursuant to private trusts may not discriminate on the basis of race if the schools are operated and administered by a public trustee, (*Commonwealth of Pennsylvania v. Board of Directors of City Trusts of Philadelphia* (1957), 353 U.S.

230, 1 L.Ed.2d 792), because of the public character of the trusteeship.

People v. Northwestern University (1947), 333 Ill.App. 224, 77 N.E.2d 345, held a private educational institution not to be in a business essentially public in its nature rendering the corporation so engaged subject to public control as a telegraph and telephone company or a virtually monopolistic warehouse, and stated that the admission of the relator rested in the discretion of the University, that he had no right to be admitted and that courts have refused to coerce private educational institutions in the exercise of lawful discretion. The case was not based on race, color or creed.

Appellant claims that the problem here is not one of distinction between public and private schools but whether a negro applicant to a private school may be denied admission because of race. Of course the latter is the ultimate question, but it must be decided in part on the distinction between a public and private school in view of appellant's contention that discrimination of any kind is repugnant to the public policy of the State of California.

[*All Discrimination Not Invalid*]

To appellant's contention that any distinction or discrimination based upon race is repugnant and void under the constitution of the United States or of this state, this court cannot agree. While it is true that in *James v. Marinship Corp.*, supra, 25 Cal.2d 721, 740, the court referred to Civil Code secs. 51 and 52 as being merely declaratory of common law, and stated: "The analogy of the public service cases not only demonstrates a public policy against racial discrimination but also refutes defendants' contention that a statute is necessary to enforce such a policy where private rather than public action is involved", the only question decided by the court in the case was that a labor union which has attained a monopoly of the labor supply through closed shop agreements, such a union, like a public service business, may not unreasonably discriminate against negro workers for the sole reason that they are colored persons.

We do not believe that the doctrine of public policy established by *James v. Marinship Corp.*, supra, or *Thompson v. Moore Drydock Co.*, supra, 27 Cal.2d 595, *Williams v. International Brotherhood of Boilermakers*, supra, 27 Cal.2d 586, applies to a matter of private relationship such as that here before us, since the defendant

school has no monopoly and since the legislature has specifically declared the public policy of the state in regard to discrimination in particular locations and it is the office of the legislature and not of this court to make any additional enumerations which may be desirable. *Coleman v. Middlestaff*, supra, 147 Cal.App.2d Supp. 833.

In our opinion private schools should be entitled to contract or refuse to contract with students of their choice for whatever reason if such contract or refusal does not fall within the constitutional or statutory proscription against discrimination on the basis of race or color. We do not find any authority that such refusal does so. The judgment and order are affirmed.

CIVIL DISTURBANCES

Interracial—North Carolina

STATE of North Carolina v. James COLE, James Garland Martin and others to the State unknown.

Supreme Court of North Carolina, March 25, 1959, 107 S.E.2d 732.

SUMMARY: The Grand Wizard and the Titan of the North Carolina Ku Klux Klan were indicted and tried for inciting to riot by conducting a rally in Robeson County, North Carolina, on January 18, 1958, when Indians there were known to be restive, resulting in numerous gunshots and the wounding of two persons. Defendants moved to quash the indictment because it failed to charge any unlawful purpose or unlawful acts which the accused were assembled to commit. The motion was overruled and both named defendants were convicted. [See 3 Race Rel. L. Rep. 665 (1958) for the trial court's jury charge]. On appeal, the North Carolina Supreme Court held that there was sufficient evidence of the offense of inciting to riot to carry the case to the jury as to both defendants, and that there was no trial error as to the Wizard; but a new trial was ordered for the Titan because certain evidence, admitted at the trial as tending to show the purpose of defendant's actions, was inadmissible as to him. An extract from the opinion appears below.

DENNY, Justice.

. . .

In the case before us, the evidence supports the view that the so-called Knights of the Ku Klux Klan, under the leadership, control and direction of the defendant Cole, did by inflammatory speeches and cross-burnings, and reports thereof published in the newspapers, incense the Indians of Robeson County to such an extent that the proposed rally at Maxton would tend to provoke a breach of the peace and incite to riot. In fact, Cole was so advised before and after the rally was underway. Moreover, Cole and Martin knew that the purpose of the rally was to incense, intimidate, and scare the Indians. There is evidence to the effect that

when Sheriff McLeod arrived at the scene of the planned rally on Saturday night, 18 January 1958, he advised Cole not to try to hold the rally; that Cole said "he couldn't see any reason why he should not hold it, but would tone it down some." This we think is tantamount to an admission by Cole that he originally intended to make statements that would be resented by the Indians and likely to cause them to riot. Otherwise, why "tone it down"? As to Martin, according to the evidence admitted against him, Cole had told him about a week or two before the Maxton rally that there were about 30,000 half-breeds in Robeson County and he was going to have a meeting and try to "scare them up." Therefore, it is evident that Martin knew the purpose of this particular meeting.

[Defendants not Justified]

In light of the evidence disclosed on the record on this appeal, there can be no justification for the defendants and their associates to go to the rally at Maxton on 18 January 1958, armed with rifles, shotguns, pistols and other weapons, some concealed and others unconcealed, if their intent and purposes were legitimate and peaceful. Such show of armed defiance was incompatible with peaceful and lawful purposes. Moreover, such conduct within itself would be calculated to cause a breach of the peace in any community, particularly in a county where the defendant Cole had been preaching racial dissension and hatred and conducting cross-burnings for the purpose of frightening certain Indian families in the community. If any of the Indian residents of Robeson County are violating the law in any respect, it is the duty and responsibility of the duly constituted law enforcement officers of that county to prefer proper charges against them and to see that they are dealt with according to law (and this we are confident they will do), but there is nothing in our Constitution or laws that authorizes the Ku Klux Klan or its officers to substitute themselves for the law enforcement officers of a community or the courts of the State.

[Sufficient Evidence]

In our opinion, when all the evidence adduced in the trial below is considered in the light most favorable to the State, as it must be

on a motion for judgment as of nonsuit, it is sufficient to carry the case to the jury as to both defendants, and we so hold. *State v. Block*, 245 N.C. 661, 97 S.E.2d 243; *State v. Burgess*, 245 N.C. 304, 96 S.E.2d 54; *State v. Kluckhohn*, 243 N.C. 306, 90 S.E.2d 768.

[But Some, Inadmissible]

The defendant Martin assigns as error the admission, over objection, and exceptions duly entered, of certain evidence against him with respect to the conversations between the defendant Cole at his residence in Marion, South Carolina, Sheriff McLeod of Robeson County, and certain members of the State Highway Patrol, although Martin was not present at the time. This defendant likewise assigns as error the evidence admitted against him of certain statements made by Cole, not in the presence of the defendant Martin, as to why he had the cross-burnings at St. Pauls and East Lumberton the latter part of the week before the Maxton rally. We think the evidence as to the contents of the conversations in Marion, South Carolina and as to why the crosses were being burned in Robeson County was inadmissible as to Martin and should have been excluded as to him, and the failure to do so entitles him to a new trial. *State v. Franklin*, 248 N.C. 695, 104 S.E.2d 837; *State v. Klutz*, 206 N.C. 726, 175 S.E. 81; *State v. Simmons*, 198 N.C. 599, 152 S.E. 774; *State v. Green*, 193 N.C. 302, 136 S.E. 729.

* * *

CIVIL RIGHTS**Judicial Decision—Federal Statutes**

Paul GINSBURG v. Horace STERN, Allen M. Stearne, Charles Alvin Jones, John C. Bell, Jr., Thomas McKeen Chidsey, Michael A. Musmanno and John C. Arnold, Individually and jointly as Justices of the Supreme Court of Pennsylvania.

United States Court of Appeals, Third Circuit, February 17, 1959, 263 F.2d 457.

SUMMARY: In a federal district court civil action, the Justices of the Pennsylvania Supreme Court were charged individually and jointly with conspiring to deprive plaintiff and depriving him of Fourteenth Amendment rights now embodied in the federal Civil Rights Act. Three causes of action were set out, based on alleged improper and erroneous interpretation of Pennsylvania law and procedure in deciding unfavorably to plaintiff certain other cases in which he had been a party. For failure to state a claim upon which relief could be granted,

because defendants were immune to liability for official acts, the complaint was dismissed. 148 F.Supp. 663 (W.D. Pa. 1956). Plaintiff appealed, but subsequently moved to remand. The Court of Appeals for the Third Circuit denied the motion and affirmed the lower court judgment, except that it declined to rule on the immunity point; and it denied a petition for rehearing. 251 F.2d 49, 3 Race Rel. L. Rep. 486 (3rd Cir. 1958); *cert. denied*, 356 U.S. 932 (1958); *rehearing denied*, 356 U.S. 954 (1958); *motion to remand denied*, 357 U.S. 924 (1958). The district court then denied a motion to vacate its order dismissing the complaint. On appeal, the Court of Appeals for the Third Circuit affirmed. For a companion proceeding see 263 F.2d 458.

CIVIL RIGHTS

State Judgments—Federal Statutes

John A. CURTIS v. Chester TOWER, et al.

United States Court of Appeals, Sixth Circuit, January 7, 1959, 262 F.2d 166.

SUMMARY: A Michigan state prison inmate, convicted of assault and armed robbery, filed a complaint in federal district court, claiming, under the federal Civil Rights Act, compensation for injuries alleged to have been inflicted by police officers, his appointed counsel, and an assistant prosecuting attorney. The complaint was dismissed on the court's own motion for failure to indicate federal jurisdiction. On appeal, the Sixth Circuit Court of Appeals pointed out that plaintiff had appealed neither his conviction to Michigan appellate courts nor the denials of his petitions for habeas corpus in both the state Supreme Court and the federal district court. The court therefore dismissed the appeal, concluding: "If the State Court judgment is valid, the appellant has not been injured and his complaint in the District Court sets forth no cause of action under the Civil Rights Act."

Before ALLEN, Chief Judge, SIMONS, Circuit Judge, and GOURLEY, District Judge.

SIMONS, Circuit Judge.

The appellant is presently serving an indeterminate sentence of twenty to forty years upon conviction by a jury for the crimes of assault and armed robbery committed March 11, 1949. After three futile motions for new trial in the trial court, the overruling of two petitions for writs of habeas corpus by the Supreme Court of Michigan, the abandonment of an application for leave to appeal to the Michigan Supreme Court, the failure of his two petitions for habeas corpus in the United States District Court for the Eastern District of Michigan, and the dismissal of a previous complaint in the same court, he again seeks a remedy in the District Court under the Federal Civil Rights Statute, 42 U.S.C.A. § 1983 and § 1985, by way of a claim for compensation for injuries received at the

hands of a group of police officers, his appointed counsel, and an Assistant Prosecuting Attorney of Wayne County. The District Judge, upon his own motion, dismissed the appellant's complaint upon the ground that nothing therein indicated that the District Court had jurisdiction of the subject matter thereof.

After the denial of the appellant's motion for authority to proceed in forma pauperis, the appellant was permitted to appeal to this court. In pursuance of his appeal, he was represented by able counsel at the hearing who made a well considered oral argument supplementing an exhaustive brief. The record here filed, however, fails to show that the defendants below had been served with process. They made no response there to the complaint though all but one filed appearances here and move to dismiss the appeal.

[*Conviction and Sentence Unimpeached*]

As the case now stands in this court, there is a judgment of conviction and sentence upon a verdict of a duly impaneled jury unimpeached by any adjudication in the courts of the State or in a District Court of the United States. Michigan's corrective process of reviewing judicial determinations in criminal cases is adequate. *Whalen v. Frisbie*, 6 Cir., 185 F.2d 607, *Mahler v. Frisbie*, 6 Cir., 193 F.2d 319, and *Mulvey v. Jacques*, 6 Cir., 199 F.2d 300. Michigan law also permits a convicted defendant in a criminal case to file a delayed application for leave to appeal without limitation of time. *People v. Hurwich*, 259 Mich. 361, 243 N.W. 230; *People v. Burnstein*, 261 Mich. 534, 246 N.W. 217. The judgment of the State Court, if not vacated, corrected, or amended by the state reviewing courts, or set aside by the Federal Court for invasion of a federal constitutional

right, must be accepted by us as in full force and effect unless it is vacated by a state or federal court for some invasion of federal constitutional right. No such adjudication is perceived of record or urged in brief or argument and there has been no appeal from the several judgments overruling petitions for writs of habeas corpus in the District Court. If the State Court judgment is valid, the appellant has not been injured and his complaint in the District Court sets forth no cause of action under the Civil Rights Act. Wherefore, it must be sustained.

To this must be added the fact, sufficiently clear upon the record, that the defendants were not served with process in the District Court, so that there is no case or controversy before us in the constitutional sense. So, viewing the posture of the case, we do not reach issues of limitation or other defenses presented.

The appeal is dismissed.

CIVIL RIGHTS STATUTES

State Action—Virginia

Willis Lee GROVE v. W. Frank SMYTH, Jr., Warden, etc.

United States District Court, Eastern District, Virginia, Richmond Division, December 4, 1958, 169 F.Supp. 852.

SUMMARY: An inmate of the Virginia State Penitentiary filed, pro se, a "Claim for Declaratory Relief" in federal district court against the prison superintendent, asserting that his request for permission to order a certain law book had been denied, contrary to his rights under the Fourteenth Amendment and the federal Civil Rights Act to obtain books from which he might acquire legal knowledge useful in testing the validity of his detention. The complaint was dismissed on the ground that the matter is one within the internal jurisdiction and authority of the state prison officials and one in which the federal courts have no power or concern. It was also pointed out that petitioner had not sought relief in state courts from the state court order under which he had been imprisoned.

HUTCHESON, Chief Judge.

The plaintiff, an inmate of the Virginia State Penitentiary, has filed a document entitled "Claim for Declaratory Relief" against the defendant, who is Superintendent of the Virginia State Penitentiary. The complaint alleges jurisdiction under diversity of citizenship; on the existence of a Federal question arising under the Fourteenth Amendment to the Constitution of

the United States; under Title 28, Section 1343, U.S.C., known as the Civil Rights Act; and under Article 1, Section 8, of the Constitution of Virginia. It is specifically alleged that the plaintiff requested permission to order a certain book from West Publishing Company and that his request was denied. While the complaint refers to a specific volume, it is the position of the plaintiff that it is his right to procure any

book on the subject of the laws. The plaintiff also requested the appointment of counsel to assist him.

The defendant has filed an answer and a motion to dismiss, to which motion the plaintiff has filed an answer and a motion for an order directing his appearance before this Court for the purpose of being heard in person and for certain witnesses who are now inmates of the Virginia State Penitentiary to be produced at the hearing.

[Parties' Contentions]

In response to my suggestion, the plaintiff and counsel for the defendant have filed written briefs setting forth their respective contentions. In substance, the petitioner contends that it is his right to obtain the possession of legal books in order that he may acquire knowledge of the law to be used in testing the legality of his detention. The defendant points to the lack of any allegation to the effect that plaintiff had been refused permission to secure a copy of any particular decision; that there is no allegation that petitioner had funds to pay for any particular book or that such book contains any case or cases pertinent to the plaintiff's contention. Reference is also made to the fact that the specific book referred to, as shown by exhibit consisting of a letter from the publishers, does not exist. The defendant then bases his principal defense upon the failure of the complaint as a whole to state a case upon which relief can be granted.

While the deficiencies in the complaint specifically referred to are worthy of note, the crux of the situation here is that under the most

liberal construction which might be given it, the complaint fails to assert a claim upon which relief could properly be granted. With this contention of the defendant, I am in full accord.

[Federal Courts Not Concerned]

It merits little discussion. The entire controversy is a matter peculiarly and exclusively within the internal jurisdiction and authority of the prison officials and is a matter in which the Federal Courts have no power or concern. It is deemed necessary to cite only a few cases among those bearing upon the subject. See *Price v. Johnston*, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356; *Stroud v. Swope*, 9 Cir., 187 F.2d 850; *Adams v. Ellis*, 5 Cir., 197 F.2d 483; *United States ex rel. Wagner v. Ragen*, 7 Cir., 213 F.2d 294. *Price v. Johnston* and *Stroud v. Swope* involved prisoners in Federal institutions. *Adams v. Ellis* and *United States v. Ragen* involved the rights of prisoners in state institutions.

While it is conceivable that under some circumstances a court might see fit to interfere with the internal jurisdiction and authority of prison officials with regard to inmates, this is certainly no such case. The lack of merit is emphasized when it is recalled that this is an application made to a Federal Court by one in custody pursuant to the order of a state court who has not sought relief in the courts of the state. Attempted interference by a Federal Court would present an extraordinary situation.

It follows that the several motions filed by the plaintiff including the appointment of counsel, will be denied, and the motion of the defendants to dismiss the complaint will be granted.

CRIMINAL LAW

Conspiracy, Mayhem—Alabama

Jessie W. MABRY v. STATE.

Court of Appeals of Alabama, January 6, 1959, 110 So.2d 250.

SUMMARY: Defendant appealed to the Alabama Court of Appeals a circuit court conviction of mayhem for which he had been given the maximum sentence, a 20-year penitentiary term. The evidence had disclosed that at a meeting of six white men, including appellant, in the latter's yard, it was agreed to go out and "grab a Negro" or "grab a Negro and scare him out

of him," in order to prove the leadership of a proposed captain of the group. They then set out by automobile, stopping at a drug store from which the proposed captain purchased razor blades and turpentine, although appellant denied knowing at this point what the leader's package contained. A Negro man was later seized, blindfolded with appellant's handkerchief, and forced to lie on the rear floor of a car which appellant drove back to the meeting hall. There the Negro was forced to crawl into the house, followed by appellant. After being questioned and kicked in the face, the victim was asked if he "wanted his life or his testicles," to which he replied he wanted both. He was then knocked unconscious with a tire tool, castrated with a razor blade wielded by the leader, and later abandoned in a remote area, from all of which he eventually recovered. Appellant's conviction was based on his guilt as a conspirator. His defense was that the mayhem committed was an independent, malicious act of the leader and beyond the scope of the original agreement and that, rather than aiding and abetting in committing the overt act, he had turned his head and not seen it. Affirming the conviction, the Court of Appeals held that after the true purpose of the conspiracy had been clearly revealed, appellant by failing to object or attempt to prevent its execution stood guilty of participation, and could not escape guilt by turning his head.

CRIMINAL LAW

Indians—California

Petition of Reyna Tom CARMEN for a Writ of Habeas Corpus.

United States District Court, Northern District, California, Southern Division, September 12, 1958, 165 F.Supp. 942.

SUMMARY: An Indian was convicted of murder in a California state court, but the conviction was reversed for improper instructions. *People v. Carmen*, 36 Cal.2d 768, 228 P.2d 281 (1951). After a second trial resulted in a conviction of murder, on appeal the state Supreme Court first reversed on the ground that, it appearing that both the defendant and the victim were Indians and that the crime was committed in Indian country, there was exclusive federal jurisdiction under the Ten Major Crimes Act, 265 P.2d 900 (1954); but on rehearing the conviction was affirmed, the evidence being found inadequate to support the matters alleged as a basis of federal jurisdiction. 43 Cal. 2d 342, 273 P.2d 521 (1954). On a later habeas corpus application, it was determined that the crime had been committed on an Indian allotment, title to which was held in trust by the United States, and that the defendant applicant and the victim were both Indians. However, the state Supreme Court denied the writ, holding that the trial court's jurisdiction was incontestible by habeas corpus on the basis of facts not in the record. *In re Carmen*, 48 Cal. 2d 817 (1957). The United States Supreme Court denied certiorari. *Carmen v. Dickson*, 355 U.S. 924 (1958). Application for habeas corpus was next made to a federal district court, which held that the Ten Major Crimes Act applied to all Indian allotments while in trust; that petitioner and victim had not been "emancipated" by any action of Congress; that a 1953 congressional grant to California of jurisdiction over Indians within the state was inapplicable to the 1950 crime involved in this case; and that facts outside the trial record could properly be considered in such habeas corpus proceeding in deciding that the state court lacked jurisdiction. Petitioner was therefore ordered discharged from custody under writ of habeas corpus.

ELECTIONS

Registration—Civil Rights Act

UNITED STATES of America v. James Griggs RAINES, Dixon Oxford, Roscoe Radford, Registrars of Terrell County, Georgia, F. Lawson Cook, Sr., and Mrs. F. Lawson Cook, Sr., Deputy Registrars.

United States District Court, Middle District, Georgia, Americus Division, April 16 1959, 172 F.Supp 552.

SUMMARY: The Attorney General of the United States brought an action in federal court against Terrell County, Georgia, voting officials, seeking preventive relief against alleged deprivation of voting rights of certain persons because of their race or color, in violation of the 1957 Civil Rights Act. The court rejected defendants' contentions that the remedy sought was primarily designed for emergency use and that Congress had unconstitutionally attempted to authorize the Attorney General to bring a federal court action that is neither in law, because it seeks injunctive relief, nor in equity, because remedies at law are available. However, the court agreed that the amended Civil Rights Act is not "appropriate legislation" under the Fifteenth Amendment and exceeds the jurisdiction of Congress, because it allows the Attorney General to seek an injunction against a private citizen for an individual act, divorced completely from state action. Therefore, the court held that Section 1971(c) of Title 42 is unconstitutional because it authorized invalid action, and the motion to dismiss must be granted even though the complaint here is based on acts done by state officers in their official capacity.

DAVIS, District Judge.

This is an action instituted by the Attorney General of the United States in the name of and on behalf of the United States under the provisions of the Civil Rights Act of 1957. The complaint is one seeking preventive relief against the alleged deprivation of voting rights of certain named persons on account of their race or color. The action is brought against James Griggs Raines, Dixon Oxford, Roscoe Radford, Registrars of Terrell County, Georgia, F. Lawson Cook, Sr., and Mrs. F. Lawson Cook, Sr., Deputy Registrars of Terrell County, Georgia. It is alleged that these defendants have engaged in wrongful acts and practices, which will deprive otherwise qualified persons of the right to vote because of their race or color. No attack is made upon any State law, but rather, it is alleged that the wrongful deprivation of voting rights will result from the improper and wrongful administration of the Georgia Registration laws by the named Defendants. It is against this allegedly wrongful administration of the registration laws that this complaint seeks relief.

[Motion to Dismiss]

The complaint was filed on September 4, 1958. On September 23, 1958, a motion to dismiss

said action was filed on behalf of all named Defendants. This motion was set down for hearing in Americus, Georgia, on January 26, 1959. Briefs were subsequently filed by counsel for all parties. Reply briefs and supplemental briefs were likewise filed. The Court has given careful consideration to the pleadings, oral arguments and extensive and exhaustive briefs filed with the Court.

The motion to dismiss is based primarily upon four main grounds. The first is the unconstitutionality of the section authorizing the Attorney General to file this action. This contention is grounded on two arguments. The Defendants argue that the sections involved are not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States. Secondly, they urge that Congress had no authority to authorize the Attorney General to file a suit of this nature, since it is neither an action in law or equity. This deals in part with the authority of Congress to authorize the grant of an injunction without regard to exhaustion of other available remedies. The second main ground of the motion to dismiss is the failure of the complaint to state a cause of action under the Civil Rights Act of 1957, even if constitutional. The third ground asserts that the cause should be dismissed by the Court in the exercise of its

sound discretion. Because of the Court's ultimate judgment in this matter and to facilitate clarity of presentation, these grounds will be considered in reverse order.

[*Emergency Necessary*]

In the third ground of their motion, the Defendants argue that the Court should exercise its discretion and deny the relief sought, even though it be decided that the Act under which it is brought is constitutional and the complaint states a cause of action under the statute. In support of this ground, it was pointed out that no emergency existed, such as that contemplated by Congress when this Act was enacted. Though a general election was held in Georgia in November, 1958, this complaint did not seek a temporary restraining order, or any other remedy which might have enabled the allegedly wronged parties to vote in that election. It seeks instead to secure an injunction at a time when the next scheduled election is over a year in the future. The Defendants argue that the State can afford the desired remedy prior to any election and that no such emergency exists as would justify this Court's intervention.

While some of the language of the Congressional hearings does indicate that this remedy was primarily designed for emergency use, the wording of the statute imposed so much [sic] limitation. This Court cannot so limit the applicability of the Statute. Similarly, the failure of the complaint to seek such relief as might have protected the voting rights of the allegedly wronged parties prior to the November election does not impede the operation of the statute. It may raise some question as to the motive of the litigation, but the Court without hearing any of the evidence would not be disposed to dismiss the proceedings in the exercise of its discretion. It is true that equitable relief may be denied in the exercise of the Court's discretion, but it should be a discretion informed by evidence. The Court is of the opinion that, based on the complaint, alone, it is not in possession of sufficient facts to dismiss the complaint in the exercise of its sound discretion.

[*Cause of Action Stated*]

The Court next comes to a consideration of the question of whether or not this complaint states a cause of action under the provisions of

42 USC 1971. The complaint alleges that the Defendants, as individuals, acting in the exercise of their state given authority as registrars and deputy registrars of Terrell County, Georgia, engaged in certain acts and practices, designed and intended to deny otherwise qualified persons the right to vote because of their race and color. It is alleged that they delayed handling of Negro applications for registration, arbitrarily refused to register Negroes who demonstrated their qualifications to vote, and for purposes of discrimination, applied more difficult and stringent registration standards to Negro applicants than to white applicants.

It is further alleged that registration is a legal prerequisite to voting in Georgia, and that this discrimination in administration of registration procedures was on account of the race of the applicants.

There can be no question but that these allegations are sufficient to bring the allegedly wrongful conduct of the Defendants within the coverage of 42 USC 1971. Whether that statute be construed as one limited to state action, as argued by the United States, or as extending to purely individual action, as contended by the Defendants, the language of the complaint would state a cause of action. It alleges that these Defendants have engaged in certain acts or practices which will deprive others of their right to vote, when otherwise qualified, without distinction as to race or color. The acts and practices alleged are those of the Defendants while acting (even though wrongfully) in the exercise of state given authority. Thus, under any reading of the statute, the facts alleged make out a cause of action.

So it is, that this is not a case such as *Collins v. Hardyman*, 341 U.S. 651, where the Court can avoid the question of constitutionality. Having determined that none of the other grounds of the Motion to Dismiss are valid, the Court now passes to the final and most important point raised by that motion; to-wit, the constitutionality of the Act under which this action is brought.

[*Action in Equity*]

The first prong of the constitutional attack on the statute questions the authority of Congress to authorize the Attorney General to bring an action in this Court, which is neither an action in law or equity. It is urged that this is not a

legal action, seeking as it does injunctive relief. On the other hand, it is argued that it is not an equitable action, since it violates one of the oldest rules of equity, the unavailability of the injunctive process where other legal remedies are available. The Defendants thus contend that this is neither a suit in law or equity, and that Congress had no right to authorize it. This Court cannot accept this contention.

While a court may question the wisdom of overruling an old and well established maxim of equity, the Court knows of no limitation on the powers of Congress to legislate in this field. The fact that Congress in sub-section (d) of Section 1971 provided that the courts shall exercise that jurisdiction "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law," does not change the nature of this action from one in equity. It merely provides that in such an equitable proceeding a certain well established principle shall not be applicable. The Court knows of no limitation on the right of Congress to so legislate. It is well known that the Federal Courts have often refused to act because the complainants had failed to exhaust their other remedies. *Peay v. Cox*, 190 F.2d, 123, 125 (5th Cir.). This rule, however, could hardly be applied where Congress has expressly directed the courts to exercise their jurisdiction without regard to such fact.

The Defendants contend that such a limitation of the Court's exercise of their jurisdiction is an invasion by the legislative branch of matter properly committed to the judicial branch and thus violative of the separation of powers doctrine. The Court is far from convinced as to the soundness of this argument, but has not explored it extensively because it does not seem necessary, in view of the ultimate disposition of this motion.

[Appropriate Legislation?]

This brings us, finally, to what appears to be the most substantial contention of the Defendants; that is, that 42 USC 1971 is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment and exceeds the jurisdiction of the Congress.

It should be noted at the outset that this action is one brought by the Attorney General in the name of and on behalf of the United States. It is not an action by the allegedly wronged

party under the provisions of 42 USC 1983, and differs materially from those cases. In that type of case, the "self executing ban" of the Fifteenth Amendment proscribes certain conduct and Section 1983 provides a remedy therefor, without resort to 42 USC 1971. It was the availability of this "self executing ban" which has heretofore allowed the Supreme Court to apparently by-pass a clear ruling on the constitutionality of Section 1971-(a). *Terry v. Adams*, 345 U.S. 461, 481.

[Attorney General's Standing]

In the instant case, however, the Attorney General has no standing for the bringing of this action, except the recently enacted provisions of Section 1971. Any right that he has to seek preventive relief, where citizens allegedly have been or are about to be denied their right to vote on account of race, is based on Section 1971 (c). Prior to its enactment, such an action could not have been entertained. Thus, it is that the question of the constitutionality of that Section cannot be sidestepped or by-passed. Due to the wording of sub-section (c) of the statute and the way in which it is tied to sub-section (a), the latter must also be given its first really critical examination.

As originally enacted and as it remained on the statute books of this country from 1870 until 1957, the present sub-section (a), (formerly Section 1971 in its entirety), was merely a general statement of principle or of rights, without providing any sanction or remedy for its violation. *U.S. v. Reese*, 92 U.S. 214; *U.S. v. Cruikshank*, 92 U.S. 542. For this reason, no action could ever be based upon this section alone. Many actions were filed under Sections 1982 and 1971, relying also on the Fifteenth Amendment. It will be noted that in any suit filed under Section 1983, there could be no question such as is here presented, since Section 1983 is applicable only to persons acting "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory." By its unmistakably clear language, Section 1983 did not authorize any action for purely private acts, even though such practices resulted in a person being deprived of the right to vote on account of his race.

[Private Citizen Enjoinable?]

This brings into focus the question which is now presented for determination by this Court.

Under Section 1971 as passed in 1957, is the Attorney General permitted to institute proceedings for preventive relief, where the alleged wrongful deprivation is that of a private citizen, not a state officer, not acting under color of any state law, custom or usage?

In considering this question, we must close our mind to the allegations of the complaint in the instant case. The question is, not what the Attorney General has done here, but what Congress has authorized him to do. As was clearly demonstrated in the case of *United States v. Reese, et al.*, U.S. 214, where a statute is enacted in general terms sufficiently broad to apply to wrongful acts, outside as well as within the constitutional jurisdiction of Congress, such a statute cannot be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit. "To limit this statute in the manner now asked would be to make a new law, not to enforce an old one." *Ibid.* It is well to note that the Supreme Court was there considering one section of the Act of 1870, of which Section 1971 (a) was a part.

Thus, it is not for this Court to decide whether this particular fish is properly within the net, but whether the net is so large as to catch many fish not properly within it.

[State Action Required]

It is clear beyond question, that the Fifteenth Amendment to the Constitution relates "solely to action by the United States or by any State, and does not contemplate wrongful individual acts." *James v. Bowman*, 190 U.S. 127. The statute which is here under consideration, as did the one in the above cited case, "on its face . . . purports to be an exercise of the power granted to Congress by the Fifteenth Amendment. The government of the United States is one of delegated, limited, and enumerated powers. Therefore, every valid act of Congress must find in the Constitution some warrant for its passage." *U.S. v. Harris*, 106 U.S. 629. The power of Congress to legislate at all upon the subject of voting at State elections rests upon the Fifteenth Amendment. Prior to its enactment there was no constitutional guaranty against discrimination on account of race, color or previous condition of servitude. *U.S. v. Reese, et al.*, 92 U.S. 214.

Thus, it will be seen that, if Section 1971 (c) is constitutional, it is because of the power given Congress by the Fifteenth Amendment. As

stated, that Amendment relates solely to action by the United States or by any State and does not contemplate wrongful individual acts. The Court is mindful, of course, of the cases holding that a state acts through its lawfully constituted officials and that action by one exercising his state given authority (even though wrongly exercising it) constitutes state action. Thus, for present purposes, it will be assumed that the Fifteenth Amendment authorizes Congress, by appropriate legislation, to prohibit and punish deprivation of voting privileges on account of race or color by any State or by the officers of any State while in the exercise of state given authority. It does not, however, authorize Congress to prohibit or punish purely individual and private action depriving another of his right to vote on account of his race or color.

[Scope of 1971 (c)]

This brings us to the meat of the controversy here: What does Section 1971 (c) seek to do? Is it limited to state action, as previously defined, or is it sufficiently broad to encompass wrongful action by individuals?

In determining the scope of Section 1971 (c), the Court must consider the language of that section. Is there any limitation within the section itself? The section, as enacted in 1957, reads, as follows:

"Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act of practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person." 42 U.S.C. 1971 (c)

[Any Person Included]

It will be noted at the outset that the section itself includes no limitation as to the persons subject to suit under it. It includes *any person* engaging in or about to engage in a certain type of conduct. By its own terms the section is

applicable to any person engaging in the type of action described therein. Thus, it follows that the only limitation, if any there be, must come from the act or practice described therein. In other words, any person capable of engaging in the type of act or practice described would be subject to suit by the Attorney General. If any person other than one clothed with state authority can engage in such act or practice, then the section is broad enough to allow suit against him and is not limited to state action. It will be particularly noted that the section makes no reference to color of law, a phrase with which the Congress is very familiar, having used it in other sections of this, as well as other Civil Rights Acts. More will be said about this later.

[Proscribed Practices]

Now, what is the proscribed act or practice which brings this section into play? It is not any act or practice which would deprive another of his rights under the Fifteenth Amendment. If that were the language, there could be no doubt about its limitation to state action, since a private citizen acting individually cannot deprive another of his rights under the Fifteenth Amendment. As argued in *James v. Bowman*, 190 U.S. 127, 135, a statute in such general language aimed only at such acts as deprived another of whatever rights he had under the Fifteenth Amendment, could not be unconstitutional. It would just be up to the Courts then to determine in each case whether or not the statute applied to the conduct alleged in the complaint. The statute itself would proscribe only that which violated the Amendment. Any set of facts falling short of a violation of the Amendment would not state a cause of action under the statute.

Here, however, Congress did not so limit the statute. The action proscribed therein is "any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section." Again we come to the question: Can any person other than one clothed with the authority of the State engage in such an act or practice? To properly determine that, we must first determine what rights and privileges are secured by subsection (a) of Section 1971. (All parties concede that subsection (b) is not here involved.)

[1870 Enforcement Act]

Subsection (a) of 42 USC 1971 was originally passed in 1870, as a part of what was known as the Enforcement Act, consisting of 23 sections. It was enacted soon after the adoption of the 14th and 15th Amendments. It was in some respects a sort of preamble to the Enforcement Act, in that it merely stated a right or privilege, while the sections that followed it sought to establish remedies for specific violations of civil rights. The section, as originally enacted, was reenacted in 1957 as subsection (a) of Section 1971. Theretofore it had been the entire section.

The subsection reads, as follows:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." 42 U.S.C. 1971 (a).

Now, what is the right or privilege secured by this subsection? In this Court's opinion, it is the right and privilege of all persons otherwise qualified to vote to be entitled and allowed to vote, without distinction of race or color and to effectuate this right all state constitutional provisions, laws, customs, usages and regulations to the contrary are expressly set aside.

["Allowed to Vote"]

But, this right to be entitled and allowed to vote, as stated, is not simply the right to be free of state interference but is the right to be free of interference from any source on account of one's race or color. It may be that the word "entitled," as used, carries with it some idea of state action only, since entitlement to vote can come from the state alone and can be denied only by the state, acting through its officials. Entitlement is a legal status, which can neither be conferred nor denied by a private citizen. But, the phrase, "allowed to vote" carries with it no such idea of state action or legal status. It denotes the physical action of voting and it

may be interfered with or denied to another by any person, state official or private citizen. A person who is kidnapped at the polls and spirited away has been denied his right to be allowed to vote. One who is prevented from voting through threats or intimidation has been denied his right to be allowed to vote, just as completely as if the poll manager had refused to accept his ballot. It thus appears to this Court that the right secured by this subsection is such a right of which a person can be deprived, by the act of practice of any other person, state official or private citizen.

This view is strengthened by a look at the other provisions of the Enforcement Act of 1870, of which this subsection, verbatim, was the first section. As previously stated, it was a sort of preamble to that Act, in that it stated general principles while the following sections contained the "teeth."

[Unconstitutionality of 1870 Act]

The Court feels that it is, therefore, proper to consider the fact that in Section Five of the Enforcement Act of 1870, Congress made it a crime for any individual to hinder, control or intimidate others by bribery or threats from exercising their right of suffrage guaranteed by the Fifteenth Amendment. While this section was declared unconstitutional in the case of *James v. Bowman*, 190 U.S. 127, on the same grounds here urged, and is no longer on the books, it does have some bearing, in that it reflects the thinking of the Congress which originally enacted this legislation. In this Court's opinion, the imposition of a criminal sanction, for purely private and individual action, indicates that the previous general statement of principle and rights was sufficiently broad to include the right to be free from private as well as state interference.

It is of interest to note that Sections Three, Four and Five of the Act of 1870 have since been declared unconstitutional as in excess of the jurisdiction conferred upon Congress by the Fifteenth Amendment. This, to say the least, waters down considerably any presumption that Congress on this occasion was acting within the scope of its legislative authority. Any such presumption is further weakened by the principle that the Government of the United States, being a government of limited and enumerated powers, every valid act of Congress must find

in the Constitution some warrant for its passage. *U. S. v. Harris*, 106 U. S. 629, 636.

[Dissenting Opinion Considered]

In carefully scrutinizing this passage, in order to determine whether the right therein declared is limited to the right to be free from state discrimination, the Court is impressed with the reasoning of the dissenting opinion of Justices Burton, Black and Douglas, in the case of *Collins v. Hardyman*, 341 U.S. 651, 663, 664, wherein it was stated: "The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes. R. S. Sec. 1980(3) speaks of 'two or more persons in any State or Territory' conspiring. That clause is not limited to state officials. Still more obviously, where the section speaks of persons going 'in disguise on the highway . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws', it certainly does not limit its reference to actions of that kind by state officials. When Congress, at this period, did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms."

It is the opinion of this Court that this statement applies with equal force to subsections (a) and (c). In 1870, when (a) was first enacted, and in 1957 when (c) was enacted, Congress in other and similar legislation demonstrated its ability to limit such legislation to state officials by the use of clear and unequivocal language. The term "under color of law" was employed in subsection (b) of the Act of 1957. Other sections of the Act of 1870 employed the phrase "whenever, by or under the authority of the constitution or laws of any State . . ."

[Complaint Examined]

It is interesting to note, in this connection, that the complaint of the United States in this case defines the rights and privileges secured by subsection (a) of the statute in Paragraph One, in the following language: "the right and privilege of citizens of the United States who are otherwise qualified by law to vote at any election by the people in the State of Georgia to be entitled and allowed to vote at all such elections without distinction of race or color."

This statement of the right secured completely omits any reference to state constitutions, laws, usage, custom or regulations. The right is similarly defined in the majority report of the House Committee which recommended passage of the Act. House Report No. 291, U.S. Code Congr. and Admin. News, 85th Cong., 1st Sess., 1957, p. 1977.

[No Qualification Intended]

The language of the subsection following the semicolon; to-wit: "any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding," was not intended to qualify and limit all that had gone before it in the section. To so hold would mean that even direct and positive state action of discrimination in voting rights on account of color could not be reached under this statute, unless the state action was based on some constitutional provision, law, custom, usage or regulation. Clearly, this was not intended when the section was re-enacted by Congress in 1957. This point is supported by the testimony of Attorney General Brownell during the House Hearings on the Civil Rights Act of 1957, wherein he stated:

"For example, if you have a registrar of voters who arbitrarily strikes off several thousand names of Negro voters shortly before the deadline for qualification of voters and gives no hearing to them or an inadequate hearing, then I would think that would be a case that would alert the Attorney General under this bill to the need for some injunctive action, which would give those people their day in court and allow them, like any other citizen, the right of franchise." Hearing of Subcommittee of House on the Civil Rights Act of 1957, Serial No. 1, p. 601.

Clearly, it could not be argued that such conduct by one registrar in contravention of state law was based on any constitutional provision, statute, usage, custom or regulation. An isolated example could hardly be termed a state custom or usage. Congress did not intend to so limit the application of this section. If it was not an absolute limitation as written, it could hardly be re-worded by the courts to limit the section to a deprivation of voting rights by state officials only.

[Remedial Section Unconstitutional]

It may be argued, and has been, that the

reliance on this section over the years proves its constitutionality. In viewing this contention, it must be remembered that this section was in no wise remedial. It was relied upon only in cases brought under remedial statutes, which included the term "under color of statute, ordinance, regulation, custom, or usage, of any State or Territory," and other similar language. When the two sections were construed together, they clearly did not provide any remedy against private, individual action. Thus, there was no reason for any attack on subsection (a). Now, however, Congress seeks to tie together two sections, neither of which is limited to state action or action by state authority. This it cannot do. When linked with a remedial statute properly limited, subsection (a) is harmless. But, when linked, as here, with a remedial section which uses the phrase "any person," it renders the remedial section beyond the jurisdiction of Congress and unconstitutional.

[Private Remedy Created]

Subsection (c) creates a remedy against purely private, as distinguished from state, deprivation of voting rights on account of race or color. The fact that the instant case is a suit against state officials cannot alter the scope of the statute. This illustrates the danger of this type of legislation, which danger was recognized as early as the case of *United States v. Reese, et al.*, 92 U.S. 214. There the Court held: "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, can be limited by judicial construction, so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there." It is true that there the Court was dealing with a penal statute. Here we are dealing with a statute authorizing an injunction, violation of which may carry its own penalty. The same principle would seem ap-

plicable.¹ When a person is enjoined from violating a statute, he is entitled to know what that statute proscribes, without awaiting the finality of an authoritative court opinion.

[*Reese Case Relied On*]

As stated in the Reese case, *supra*: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

That this is exactly what this section seeks to do is demonstrated by the testimony of Attorney General Brownell in the Senate Hearings before the Subcommittee on Constitutional Rights while considering the Civil Rights Act of 1957. On page 25 of those Hearings, Mr. Brownell testified: "These sections 4 and 5" (subsections (c) and (d) of the law as enacted) "are added here as machinery to enforce whatever the constitutional authority of the Federal Government may be in this area, and does not add to the substantive provisions of the statute."

Again, at page 51, he testified: "... our guiding principle will be that only those statutes, parts of statutes that are constitutional, would be enforced by us, and we would not act in any way contrary to a Supreme Court opinion which holds that a statute or any part thereof that is unconstitutional." This indicates that the statute as written is sufficiently broad to include unconstitutional matter, but that the Attorney General expressed his intention of administering it in such a way as to seek no unconstitutional relief. While this is a noteworthy sentiment, the tenure of the Attorney General being what it is, the Courts can hardly rely on his intentions as to the administration of an act which in itself would support the grant of unconstitutional relief, if requested.

1. During the Subcommittee hearings on the Civil Rights Act of 1957, Senator Ervin made the following remark: "... if Congress has no power to provide any criminal penalties for those acts under the Constitution because it has no right to legislate in that particular area, it certainly would have no right to enact a civil law." To which Mr. Brownell replied: "That is correct, and we are not asking for it. The difference between the type of remedy provided would not seem to alter the right of Congress to legislate with reference to it." Hearings before the Subcommittee of Constitutional Rights of the Committee on the Judiciary, United States Senate, February 14, 1957, P. 25.

[*Devotion to Dual Sovereignty*]

The Court has explored this question with particularity, because it is not unmindful in the least of the seriousness of the problem. This Court has never and shall never condone wrongful deprivation of the constitutional rights of any person by a state official or a private citizen. On the other hand, this Court is also sensitive to the dual sovereignty system of government under which we operate and is sincerely devoted to its preservation.

It is this Court's considered opinion that this statute would allow the Attorney General to seek an injunction against a private citizen for an individual act, divorced completely from state action. It is the province of the several states to protect the rights of one citizen against the wrongful practices of another person. *James v. Bowman*, 190 U.S. 127. Congress should not be allowed to extend the authority of the Federal Government into this field. This it has tried to do. The Court is of the opinion that, if Congress intended only to authorize the Attorney General to enjoin or seek preventive relief against wrongful state action, it could easily have been accomplished, without resort to such confused legislation. Similar, if Congress wishes to leave the Courts some latitude in determining what may and what may not be enjoined, this may be accomplished by tying the remedy directly to the Fifteenth Amendment, rather than to another section, the constitutionality of which is far from clear.

[*Title 42, Section 1971 (c) Unconstitutional*]

For the reasons set forth above, the Court concludes that Section 1971 (c) of Title 42 is beyond the jurisdiction of Congress and unconstitutional. It is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States. There existing no other basis for an action by the Attorney General in the name of the United States seeking the remedy here sought, the motion to dismiss should be, and the same is hereby, GRANTED.

ORDERED FILED, this the 16 day of April, 1959.

ELECTIONS

Registration—Civil Rights Act

UNITED STATES of America v. STATE of Alabama; the Board of Registrars of Macon County, Alabama; Grady Rogers, E. P. Livingston, Registrars.

United States District Court, Middle District, Alabama, Eastern Division, March 6, 1959, 171 F. Supp. 720.

SUMMARY: The United States brought an action in federal court under Part IV of the Civil Rights Act of 1957 [2 Race Rel. L. Rep. 1011, 1013 (1957)] against the state of Alabama, the Board of Registrars of Macon County, and named individuals as members of the Board to have adjudged unconstitutional certain acts and practices of defendants, alleged to deprive persons of the right and privilege of United States citizens to vote in elections held in Alabama without racial distinction, and to obtain a permanent injunction against defendants' further engaging in such activities. Defendants moved to dismiss. The two individuals argued that preventive relief should not be granted as against them because they had already in good faith absolutely resigned office after having turned over to the county sheriff, in response to a subpoena duces tecum, all the records sought by plaintiff in this case. In sustaining this contention, the court held that the statutory language that "[R]egistrars may hold office for four years . . . and until their successors are appointed" did not indicate a legislative intent that registrars are obligated to serve until appointment of successors. It was also held that preventive relief was not available against the Board because it was a non-suable legal entity and not a "person" within the Civil Rights Act, and that the Act does not authorize the United States Attorney General to bring actions for preventive relief against states. The action was therefore dismissed against all defendants. [Note: see also *In re Wallace*, 170 F.Supp. 63, 4 Race Rel. L. Rep. 97 (M.D. Ala. 1958)].

JOHNSON, District Judge.

MEMORANDUM OPINION

This is an action by the United States, as plaintiff, against Grady Rogers and E. P. Livingston—each as a member of the Board of Registrars of Macon County, Alabama—The Board of Registrars of Macon County, Alabama, and the State of Alabama, as defendants.

The action is brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 42 U.S.C.A. 1971 (c))¹ to obtain preventive relief against acts and practices by the named defendants which deprive other persons of rights and privileges secured by § 1971 (a) of Title 42, U.S.C.A., namely, the right and privilege of

citizens of the United States, who are otherwise qualified by law to vote at any election by the people in the State of Alabama, to be entitled and allowed to vote at all such elections without distinction of race or color.

[Racial Discrimination Alleged]

The plaintiff says that each of the named defendants, being under a constitutional obligation to fulfill certain duties and obligations relative to registering qualified applicants of Macon County, Alabama, to vote without regard to considerations of race or color, has, for many years, persisted in acts and practices in violation of this constitutional obligation, which acts and practices have resulted in depriving qualified citizens of their right to vote solely because of their race and color.

Originally the action did not include the State of Alabama as a defendant. However, the action was, pursuant to the provisions of Rule 15 of the Federal Rules of Civil Procedure, amended on February 23, 1959, to add as an additional party defendant the State of Alabama.

Plaintiff details the "acts and practices" the defendants are alleged to engage in in violation

1. § 1971 (c). "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

of their constitutional obligations and seeks to have this Court adjudge those acts and practices to be in violation of the constitution and laws of the United States and to declare that said defendants are under a legal duty not to engage in, or permit its agents, officials and agencies to engage in such practices. Plaintiff also seeks to have this Court permanently enjoin the named defendants, or any of the defendants' agents, officials, and/or agencies from engaging in said acts and practices.

On February 12, 1959, the plaintiff, by appropriate motion and supporting documents, moved this Court for an order directing the defendants to produce and permit the inspection, copying, and photographing of certain records, documents, and papers. This Court, upon proper application, issued on February 12, 1959, a temporary restraining order pending disposition of said motion to produce, restraining the defendants and/or their agents from destroying or otherwise rendering unavailable certain voting and registration records and other enumerated documents made and received by the Macon County, Alabama, Board of Registrars since January 1, 1954. The motion to produce, the order that was entered upon the motion to produce, and the temporary restraining order were amended on February 23, 1959, to include defendant State of Alabama.

[Defendants' Motions]

The defendants Rogers, Livingston, and The Board of Registrars of Macon County, Alabama, separately and severally (1) move to dismiss the action as to each of them (amended February 23, 1959); (2) move to "strike and quash" the service upon each of them of the various papers in this cause; (3) object to plaintiff's motion to produce; and (4) move to dissolve as to each of them the temporary restraining order issued by this Court on February 12, 1959. The defendant State of Alabama also moves to dismiss the action as to it.

All of said defendants' motions and objections are now submitted to the Court upon the pleadings, certain affidavits and documents attached thereto, evidence by deposition, written, briefs of all parties, and oral arguments of counsel.

Considering first the defendants Rogers, Livingston, and The Board of Registrars'

amended motion to dismiss, with the supporting affidavits of the defendants Rogers and Livingston, it appears that said motion cites some sixteen grounds in support thereof. The grounds fall into four general categories. They are: (1) The State of Alabama is an indispensable party; (2) the action is precluded by the Eleventh Amendment to the Constitution of the United States; (3) no relief can be had against defendants Rogers and Livingston because they had resigned; and (4) the Civil Rights Act of 1957 authorizes suits only against individual persons.

Because of the conclusions hereinafter reached by this Court, it will not be necessary in connection with the motions of Rogers, Livingston, and The Board of Registrars, to discuss or decide the questions involved in the first two categories.

[Resignation of Registrars]

Proceeding then to the third category of points (i.e., no preventive relief should be granted against Livingston and Rogers because they had resigned as registrars), the evidence presented—in the form of uncontroverted affidavits—shows that the members of the Board of Registrars of Macon County, Alabama, prior to December 10, 1958, were Grady Rogers and E. P. Livingston, the third member having died.² On December 10, 1958,³ Livingston and Rogers each tendered to the appointing authority⁴ a written resignation as a member of the Board of Registrars of Macon County, Alabama. Said resignations were submitted during a controversy between the Commission on Civil Rights and certain Alabama officials, including Livingston and Rogers, over the right of said Commission to inspect and copy some of the same records the plaintiff in this case now seeks.⁵ Both Rogers and Livingston now say

2. In Alabama, registration of voters in each county is conducted by "a board of three reputable and suitable persons . . ." Title 17, § 21, 1940 Code of Alabama, as amended.

3. Approximately two months before this case was filed.

4. Appointing authority in Alabama is vested in the governor, auditor and commissioner of agriculture and industries, or by a majority of them acting as a board of appointment. See Title 17, § 21, 1940 Code of Alabama, as amended.

5. In Civil Action No. 1487-N, styled In re: George C. Wallace, et al., this court on January 5, 1959, ordered these same two defendants to make said records available; said order was complied with, and both Livingston and Rogers were dismissed from said action.

that said resignations were absolute and unconditional; that they were made in good faith, and that neither intends to serve again as a member of the Board of Registrars; that said resignations have been accepted by the appointing board, and that each of them has qualified and begun serving in two other public offices.⁶ Both Livingston and Rogers testify that all of the records now sought by plaintiff were turned over to the sheriff of Macon County, Alabama, by them on December 8, 1958; that such action by them was in response to a *subpoena duces tecum* issued at the instance of Tom F. Young, Circuit Solicitor of the Fifth Judicial Circuit of Alabama. Solicitor Young testifies by deposition in this cause and the effect of his testimony is to substantiate that part of Livingston's and Rogers' testimony. Solicitor Young unequivocally states that he now has the custody of said records and that said records are in a locked room in the courthouse of Macon County, Alabama.

THE DEFENDANTS

LIVINGSTON AND ROGERS:

The matter is therefore focused as to Livingston and Rogers. If, as they contend, their resignations were effective in all respects, they cannot now be sued in their capacity as registrars of Macon County, Alabama.⁷

If, however, as the plaintiff contends, they have the continuing obligations of their office as registrars of Macon County, Alabama, until their successors are appointed,⁸ they are proper parties to this action.

The statute prescribing the terms of office for the registrars in Alabama, designated as § 22 of Title 17, 1940 Code of Alabama, as amended, is as follows:

"§ 22. *Terms of office.*—The registrars so appointed under this article may be removed at the will of the appointing board, or a majority of the members thereof, at any time, with or without cause, and without giving their reasons therefor; and if not so

removed, the registrars may hold office for four years from the time of their appointment and until their successors are appointed."

The plaintiff reasons that the word "may" as used in this statute is to be construed to mean "shall" wherever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. Such a theory is not without supporting authority—even in Alabama. See *Montgomery v. Henry*, 144 Ala. 629 (1905).⁹

[Legislative Intent]

However, the real question here is: What did the Legislature of Alabama intend? There are no cases directly in point. In making an effort to resolve this question it is significant to note that Alabama has a general statute relating to terms of office. This general statute, designated as Title 41, § 176, 1940 Code of Alabama, as amended, reads as follows:

"*Vacancies in state and county offices; how filled; term of office.*—Vacancies in all state and county offices are filled by appointment of the governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired term, and until their successors are elected and qualified."

It can very readily be seen that § 176 of Title 41 is not applicable to the registrars because of that portion of § 176 that says "except as otherwise provided"; this is true since it is "otherwise provided" in § 22 of Title 17, *supra*. Thus, insofar as the term of office for registrars is concerned, § 22 of Title 17 is generally controlling.

This Court is of the opinion that had the Legislature of the State of Alabama intended for the registrars to remain obligated to serve until their successors were appointed and qualified they would not have used the permissive term "may" but would have used the imperative term "shall" as they did in the general statute, *supra*.

[Badger, Green, Lauderdale Cases]

In *Badger, et al. v. U. S. Ex Rel. Bolles*, (1876), 93 U.S. 599, which case is heavily relied

6. Rogers was in May, 1958, nominated for and in November, 1958, elected to the Alabama House of Representatives; he was sworn in and commenced serving as such official in January, 1959. Livingston was appointed to be a jury commissioner for Macon County sometime after this suit was filed.
7. This Court does not understand that Livingston and Rogers are sued in any capacity other than as members of the Board of Registrars; their appearance in this cause as "individuals" was unnecessary.
8. No successors have yet been appointed.

9. Also see *Wilson v. United States*, 135 F.2d 1005; *Vason v. City of Augusta*, 38 Ga. 542, and *People v. Turnbull*, 184 Ill. App. 151.

upon by the plaintiff, the Supreme Court had before it for interpretation a statute of the State of Illinois, the pertinent part of that statute being "they shall hold their offices until their successors shall be qualified." The question there before the court was whether or not certain officers, to-wit, a supervisor, town clerk, or justice of the peace, could resign their offices and thereby be relieved of their duties and responsibilities prior to the time their successor was appointed or chosen and was qualified. Mr. Justice Hunt, delivering the opinion of the Supreme Court of the United States in October, 1876, decided this question by stating:

"The resignations may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact; to-wit, the appointment of a successor, and his better qualification."

The court went on to say:

"So, we think, where a person being in an office seeks to prevent the performance of its duties to a creditor of the town, by a hasty resignation, he must see that he resigns not only *de facto*, but *de jure*; that he resigns his office not only, but that a successor is appointed. An attempt to create a vacancy at a time when such action is fatal to the creditor will not be helped out by the aid of the courts."

Another case relied upon by the United States to sustain its position that Livingston and Rogers cannot resign until their successors have been appointed and qualified is the case of *United States v. Green, et al.*, (Cir. Ct. W. D. Missouri, 1892), 53 F. 769. The applicable law there was part of the Constitution of Missouri, reading as follows:

"In the absence of any contrary provision, all officers hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."¹⁰

10. It should also be noted that in the *Green* case the process sought to be enforced (mandamus) was made final before the officials attempted to resign. The court seemed to attach considerable significance to that fact, saying: "Their attempt to thus escape the judgment of this court was so abortive as it was ill advised."

A similar point was also raised in *United States v. Justices of Lauderdale County*, (1882), 10 F. 460; this case involved a Tennessee statute which stated that "every officer shall hold his office until his successor is elected or appointed and qualified."

[Cases Distinguished]

The rationale of the *Badger, Green*, and *Lauderdale* cases is that the acceptance by an individual of a public office and the awarding of this office upon an individual is "the imposition of a public trust by agreement between the state and the officeholder. Why may not the state attach as a condition to the bestowal of the honors and compensation growing out of the trust, that it shall not be surrendered until the state has designated a successor, so that the public interests shall not suffer?" That rationale appears to be good, consistent, and legally sound insofar as it relates to the Illinois, the Missouri, and the Tennessee statutes. However, it is not sound and it cannot be made applicable to the Alabama statute. To hold that Registrars Livingston and Rogers entered into an agreement with the State of Alabama, when they accepted the appointment of registrars of Macon County, to the effect that they "shall" or "must" or "would" continue in said office until their successors had been appointed and qualified would be to disregard completely the wording of the Alabama statute.

To so hold would be to disregard completely the intent of the Legislature of the State of Alabama, which intent is manifested by the wording of that statute.

To so hold would be to disregard completely § 160, Title 41 of the 1940 Code of Alabama, as amended,¹¹ which statute specifically recognizes and provides that such offices can be vacated "By . . . resignation, except in such cases as are

11. "§ 160. *How offices are vacated.*—Any office in this state is vacated:

"By the death of the incumbent.

"By his resignation, except in such cases as are excepted by law.

"By ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed.

"By the decision of a competent tribunal declaring his election or appointment void, or his office vacant.

"By the act of the legislature abridging his term of office, when the same is not fixed by the constitution.

"In such other cases as are or may be declared by law."

excepted by law." There are no exceptions in the case of registrars. In this connection, see *Amy v. Watertown* (1888), 130 U.S. 301, 316, in which case the Supreme Court recognized that the statute law of Wisconsin providing for the procedure to be followed in cases of resignation "was decisive" and "preclude the operation of any such rule as was recognized in *Badger v. Bolles* . . ."

[*Registrars May Resign*]

Under the Alabama law, Registrars Livingston and Rogers (as well as any other registrars that accept an appointment while § 22 of Title 17 is in effect) accepted their appointments and agreed to serve "at the will of the appointing board" and with the understanding that they could be removed at any time by a majority of the appointing board (the governor, auditor and commissioner of agriculture and industries) "with or without cause and without giving their reasons therefor." For this Court to follow the *Badger*, the *Green*, and the *Lauderdale* cases and to apply the rationale of those cases to this case would also mean that the registrar who accepted a position under a statute which said he "may hold office for four years" (subject to removal at the possible whim of the appointing board) could not for reasons of health or business, or other good and substantial reasons, in good faith terminate his office by resignation until the appointing authority decided to appoint his successor and until his successor got around to qualifying. This Court must and does now hold that the Legislature of the State of Alabama, in using the word "may" intended that the registrars not be required to hold office for four years from the time of their appointment, but that they "may" be removed with or without cause by the appointing board and that they "may" in good faith resign their office. Such an interpretation works no great hardship upon anyone. It does not permit any widespread conspiracy to defeat the law, it does not necessarily permit the paralyzation of governmental functions that are necessary to organized society, and it does not permit any "hiatus or interregnum," since the remedy of mandamus, if the circumstances warrant and justify its use, is always available to require the appointing board to fill, if they refuse to act within a reasonable time, any vacancies that may be created, such as these.

Nothing stated in this opinion should be

construed to mean that this Court sanctions or will sanction the proposition (here unnecessarily advanced by Livingston and Rogers) that registrars are free to resign at will, indiscriminately and in bad faith, and thereby cast off all of their responsibilities and obligations as such officers.

THE DEFENDANT

"THE BOARD OF REGISTRARS

OF MACON COUNTY, ALABAMA":

The next category of points raised by the motion to dismiss relates only to the defendant "The Board of Registrars of Macon County, Alabama." It is contended that this Court has no jurisdiction over the Board of Registrars as such, because, first, said Board is not in fact or in law a separate suable entity, and, second, the Board is not a "person" within the meaning of that section of the Civil Rights Act authorizing preventive relief suits such as this one.¹²

Registration in Alabama is provided for in § 186 of the Alabama Constitution of 1901 and Title 17, § 21 of the 1940 Code of Alabama, as amended.¹³ It is the individuals on the Board, and not the Board itself, that conduct the registration; it is the individuals on the Board who may by their "acts and practices" deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote. Therefore, it is the individual officers that preventive relief—here in the form of injunctions—must be obtained against.

[*Governmental Body Suability*]

In *Handy Cafe, Inc. v. Justices of the Superior Court, et al.*, (1st Cir., 1957), 248 F.2d 485, cert. den. March 10, 1958, 356 U.S. 902, the plaintiff sued, under § 1983, Title 42, U.S.C.A.¹⁴ (an old Civil Rights statute), "the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts."

12. Sec. 1971 (c), Title 42, U.S.C.A.

13. The pertinent part of that Code section being set out in footnote 2.

14. "Every person who, under color of any statute, ordinance, regulation or custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . ."

Plaintiff there claimed deprivation of certain constitutional rights by those defendants, under color of their respective offices and that it (the plaintiff) had been denied the equal protection of the laws, contrary to the Fourteenth Amendment. The plaintiff there sought declaratory relief and an injunction.

With reference to whether or not "the members of the Superior Court and Supreme Judicial Court" constituted a suable legal entity, the First Circuit Court of Appeals in a per curiam opinion¹⁵ stated:

"In addition to the foregoing, we are bound to observe that we know of no authority to the effect that 'the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts' constitute suable legal entities. Action under the Civil Rights Act must be against the individual persons or officials who, under color of their respective state offices, subject a person to denial of federal constitutional rights. There are over thirty judges of the Massachusetts Superior Court throughout the Commonwealth and seven justices of the Supreme Judicial Court. Obviously not all of these persons could have been concerned with the various state court proceedings herein complained of. It does not appear against which individuals judgments for damages and enforcement orders are sought to be issued.

"All in all, we regard this as a completely preposterous case."

Also in point here is the case of *Hewitt v. City of Jacksonville*, (1951, 5th Cir.), 188 F.2d 423, where the court, speaking through Judge Holmes, said:

"The lower court, in refusing to allow the amended complaint to be filed, held that the word 'persons' used in the Civil Rights statute, 8 U.S.C.A. § 43, does not include a State or its governmental subdivisions acting in their sovereign . . . capacity." (Emphasis added.)

"We are in accord with the views expressed by the lower court;"

See also the Fifth Circuit case of *Charlton v. City of Hialeah*, (1951), 188 F.2d 421, which followed the *Hewitt v. Jacksonville* decision.

15. Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges, sitting.

Even though these cases involved another Civil Rights statute, this Court is of the opinion that the reasoning and conclusions reached are sound and should be applied in this case to plaintiff's action against "The Board of Registrars of Macon County, Alabama."

THE DEFENDANT STATE OF ALABAMA:

The motion to dismiss filed by the State of Alabama contains some fifty-eight grounds. These grounds fall into five general categories. They are:

(1) Civil Rights Act of 1957 authorizes actions only against "individual persons" and not states.

(2) States have exclusive jurisdiction in the field of voting by reason of the Tenth and Eleventh Amendments to the Constitution of the United States.

(3) Supreme Court of the United States has original and exclusive jurisdiction in cases involving sovereign states.

(4) Civil Rights Act of 1957 (particularly Part IV) is unconstitutional.

(5) Even if this Court determines that it has jurisdiction and determines that the Act is constitutional, it should refrain from exercising jurisdiction in this case because of comity.

[States' Jurisdiction Exclusive?]

Category two is obviously without merit. Part of what this Court said in the case of *In re: George C. Wallace, et al.*, ___ F.Supp. ___ (decided January 9, 1959), is applicable in this case and is dispositive of these points:

"The authority delegated to the Federal Government by the Fifteenth Amendment to the Constitution of the United States is undoubtedly the authority under which the Congress of the United States was acting when the Civil Rights Act of 1957 was passed. The provision in the Act providing for investigation of alleged discriminatory practices, including inspection of voting and other pertinent records, must be considered to be an essential step in the process of enforcing and protecting the right to vote regardless of color, race, religion, or national origin. That part of the Act is, therefore, by this Court considered 'appropriate legislation' within the meaning of Section 2 of the Fifteenth Amendment.

"The sovereignty of the State of Alabama, or of any other of the states, must yield, therefore, to this expression of the Congress of the United States, since this expression of Congress—by this Act—was passed in a proper exercise of a power specifically delegated to the Federal Government, and the Court cites *Ex Parte Siebold*, 100 U.S. 371. This is necessarily true even though the states possess concurrent legislative jurisdiction with respect to voting, since the Federal Government, and its law, is supreme in this area. The Court cites *Kohl v. United States*, 91 U.S. 367.

"The concept of the sovereignty of the states is embodied in the Tenth Amendment to the Constitution of the United States, this amendment providing that those powers are reserved to the states which have not been 'delegated to the United States by the Constitution, nor prohibited by it to the States.'

"Here we have involved the very powers which the Constitution of the United States says are not reserved to the states. See *United States v. Reese*, 92 U.S. 214; *United States v. Darby*, 312 U.S. 100; and *Fernandez v. Wiener*, 326 U.S. 340.

"The fact that the State of Alabama voting and registration records are involved in this case does not alter the legal principle at all. In re: *Cohen*, 62 F.2d 249; *United States v. Ponder*, 238 F.2d 825; *Endicott Johnson Corporation v. Perkins*, 317 U.S. 501.

"Thus, it must be generally concluded, and this Court now concludes, that since the Congress of the United States did have the authority to pass the Civil Rights Act of 1957 and that said authority is supreme in this field as opposed to any authority of the states, and since the Commission on Civil Rights was in issuing the subpoenas in question acting pursuant to that Act, and since this Court was in issuing its order upon the application of the Attorney General of the United States also acting pursuant to said Act, the contention that movants make that enforcement of the subpoenas will constitute and illegal invasion of the sovereignty of the State of Alabama and the contention that this Court is without jurisdiction to enforce compliance with said subpoenas are without merit and cannot stand."

[District Court Jurisdiction]

As to defendant's contention that the Supreme Court has original jurisdiction, there is no question. See Article III, § 2 of the Constitution of the United States. Also *United States v. West Virginia*, 295 U.S. 463, 470, and *United States v. California*, 297 U.S. 175, 187. However, it is not true that this jurisdiction is exclusive. In the *California* case, *supra*, the Supreme Court held that venue properly lay in the district court in *California* in an appropriate case. See also *New York v. United States*, 326 U.S. 572, and *Colorado v. United States*, 219 F.2d 474. Here, there is in 42 U.S.C.A. § 1971 (c) and (d), specific and unambiguous Congressional authorization for actions such as this one to be commenced in this Court.

Because of the conclusions thereafter reached by this Court in connection with the State's motion and in keeping with the duty of any court to avoid constitutional questions unless essential to a proper disposition of a case,¹⁶ this Court will not, at this time, pass upon the question of the constitutionality of Part IV of the Civil Rights Act of 1957. It is also unnecessary to discuss in this opinion the objections of the State upon the ground of comity.

[Action Against States Unauthorized]

The category of objections remaining concern the question of whether or not the Civil Rights Act of 1957 authorizes actions for preventive relief by the Attorney General against states. Without any doubt, the Congress of the United States had the authority to grant such a right.¹⁷ The question here is: Did it confer that authority in this Act? This Court is of the opinion that Congress did not intend for such actions against states to be authorized by this Act.

There is no doubt that such authority would be appropriate—and even in certain circumstances necessary—if Congress intended to give full and complete authority to the Attorney General of the United States to enforce the constitutional rights here involved. This Court judicially knows that the Civil Rights Act of 1957 was a compromise measure and the

16. For two recent cases reiterating this proposition see: *Harmon v. Brucker*, (1958), 355 U.S. 579, 581, and *Byers v. Byers*, (CCA 5, 1958), 254 F.2d 205, 208.

17. See the reasoning of this Court on the authority of the Federal Government in the field of voting in the case of *In re: George C. Wallace, et al.*, *supra*.

compromise reflected an intention on the part of Congress to give limited authority—as opposed to full and complete authority—in this field. A reading of the legislative history of this Act impresses this Court with the fact that if it had been mentioned that this Act authorized the United States to sue a state for preventive relief, the Act would not yet be passed.¹⁸ As a matter of fact, it is very definitely inferred by the following statement of Attorney General Brownell that the Act was only to be used to obtain preventive relief against individual persons:¹⁹

"Mr. BROWNELL. It is my opinion that the bill before you from which you quoted does not increase the Department's jurisdiction in connection with State primary elections. At the present time, our jurisdiction is limited to commencing criminal proceedings under sections 241 and 242, which are the criminal provisions of the civil-rights laws. Under 242, it is necessary that the wrongdoer be a State officer. In other words, that he be acting under color of law. Under section 241, you have to prove a conspiracy. The statute operates only against conspirators, in other words."

18. In this connection, see the testimony and statements of Attorney General Brownell before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-fifth Congress, at pages 570, 589, 590, 591, 599, and 602.

19. *Ibid.*, page 606.

The Court must presume, therefore, that Congress in using only the word "person" deliberately restricted the authority of the Attorney General to institute such actions. Such reasoning as now used and the conclusion as is now reached is analogous to the reasoning and conclusion of the Supreme Court of the United States in *United States v. Mine Workers*, (1947), 330 U.S. 258, 275. In that case, the court held, among other things, that the Norris-LaGuardia Act did not apply to the "Government in all cases" and observed:

"The Act does not define 'persons.' In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so . . . The absence of any comparable provision extending the term to *sovereign governments* implies that Congress did not desire the term to extend to *them*." (Emphasis added.)

In accordance with the foregoing, an appropriate order will be entered dismissing this action as to each of the defendants.

Since the action is to be dismissed as to all defendants, the motion to produce, as to each of them and their objections thereto, and the motion to strike and quash service are moot.

Done, this the 6th day of March, 1959.

ELECTIONS

Registration—Louisiana

Albert J. TULLIER v. Frank GIORDANO, Registrar of Voters for the Parish of Plaquemines.

United States Court of Appeals, Fifth Circuit, March 24, 1959, 265 F.2d 1.

SUMMARY: A Louisiana applicant for voter registration sued the parish registrar of voters in federal district court for injunctive relief and money damages, alleging that plaintiff and other named persons had been denied registration upon failure or refusal to comply with defendant's requirement that they interpret selected passages from the federal and state constitutions, because they were unsympathetic with defendant's political faction. It was further alleged that persons of defendant's faction had been registered without meeting such requirement, and that a deputy registrar told plaintiff that if he would align himself

with defendant's faction he would be allowed to register. The court concluded that it had jurisdiction. However, the case was dismissed on the merits because of plaintiff's testimony that defendant had said that plaintiff, without any commitment, would not have to answer questions if he would come back, and further testimony that the only reason he had been given a test was that his business was located near a similar business of defendant's brother. On appeal, the United States Court of Appeals for the Fifth Circuit, one judge dissenting, affirmed. It was found that the case was within the district court's statutory original jurisdiction of civil actions to redress deprivations of civil rights under color of state law. But the court held that the case had been properly dismissed, there not having been shown such "purposeful discrimination between persons or classes of persons" as would amount to a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment."

Before RIVES, CAMERON and WISDOM, Circuit Judges.

RIVES, Circuit Judge.

Appellant sued appellee for injunctive relief and money damages, claiming that he had a right to register as a voter in the Parish of Plaquemines, Louisiana, and that such right had been denied to him by the appellee. The first question is whether the district court had jurisdiction.

The complaint, after averring that the defendant is the Registrar of Voters for Plaquemines Parish and detailing the plaintiff's qualifications as a voter in that Parish, alleges that the defendant denied registration to the plaintiff and to a considerable number of other named persons upon the applicant's failure or refusal to meet a requirement by the defendant that the applicant interpret in writing certain selected clauses or sections of the Constitution of Louisiana and of the Constitution of the United States. The complaint alleges that the defendant registrar "has never hesitated to register without any constitutional interpretations or readings those voters of his own political faction, party or alignment"; that the defendant is "systematically discriminating against all voters hostile to him or nonsympathetic with his political faction"; that a deputy registrar informed plaintiff "that he would be permitted to register but must first divulge his political preferences, if he aligned himself with the political faction of defendant, he would be permitted to register. This complainant refused to do"; and further "that the above described practices and actions of defendant in discriminating against him while permitting others to register who were unable to pass any constitutional test has had the effect of depriving him of his right to vote not only for candidates in primary elections but also in federal elections, i. e., for Congress, United States Senator and President."

[Federal Jurisdiction]

The district court concluded: "This Court has jurisdiction over the parties and the subject matter. U. S. Constitution, Amend. 14; Title 42, U.S.C. [§] 1983; United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031 [85 L.Ed. 1368]; U. S. Const. Art. 1, Sec. 2." We agree.

The Congress has granted to the district courts original jurisdiction of a civil action to redress the deprivation under color of any State law of any rights, privileges or immunities secured by the Constitution of the United States.¹

Under our federal system the qualification of voters is left to the several states subject to some limitations imposed by the United States Constitution. As originally adopted, the Constitution contained few provisions on the subject of voting rights. Article I, Section 2, Clause 1 provided:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Section 4, Clause 1 of that Article provided:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

Touching the elective franchise possibly in an indirect or remote way was Article II, Section 1,

1. 28 U.S.C.A. § 1343; 42 U.S.C.A. § 1983.

Clause 3, later amended by the Twelfth Amendment, prescribing the procedure for electing the President and Vice President.

Amendments since the War Between the States have considerably extended the scope of federal power to regulate the elective franchise. The Fifteenth Amendment has no application to this case, since the complaint shows that the plaintiff is a white man. Nor is the Nineteenth, or Woman Suffrage, Amendment involved. The Seventeenth Amendment provides for the direct election of Senators by electors in each State having the qualifications requisite for electors of the most numerous branch of the State Legislatures.

[Classic Case Quoted]

That the complaint does state a case within the jurisdiction of the district court to redress the deprivation of rights, privileges or immunities secured by the Constitution of the United States does not require an elaborate discussion of the rights of suffrage and of the extent to which those rights are secured by the Constitution of the United States. Brief quotations from two leading cases will suffice to demonstrate that the complaint states a case within the jurisdiction of the district court.

"* * * While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see, *Minor v. Happersett*, 21 Wall. 162, 170, 22 L.Ed. 627; *United States v. Reese*, 92 U.S. 214, 217, 218, 23 L.Ed. 563; *McPherson v. Blacker*, 146 U.S. 1, 38-39, 13 S.Ct. 3, 11, 12, 36 L.Ed. 869; *Breedlove v. Suttles*, 302 U.S. 277, 283, 58 S.Ct. 205, 207, 82 L.Ed. 252, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing Powers.' See *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717; *Ex parte Yarbrough*, supra, 110 U.S. [651], 663, 664, 4 S.Ct. [152] 158, 28 L.Ed. 274; *Swafford v. Templeton*, 185 U.S. 487, 22 S.Ct. 783, 46

L.Ed. 1005; *Wiley v. Sinkler*, 179 U.S. 58, 64, 21 S.Ct. 17, 20, 45 L.Ed. 84.

"Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. *Ex parte Yarbrough*, supra; *Wiley v. Sinkler*, supra; *Swafford v. Templeton*, supra; *United States v. Mosley*, supra [238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355]; see *Ex parte Siebold*, supra; *In re Coy*, 127 U.S. 731, 8 S.Ct. 1263, 32 L.Ed. 274; *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429. And since the constitutional command is without restriction or limitation, the right unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. *Ex parte Yarbrough*, supra; *Logan v. United States*, supra." *United States v. Classic*, 1941, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368.

[Snowden v. Hughes Quoted]

"Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. *McPherson v. Blacker*, 146 U.S. 1, 23, 24, 13 S.Ct. 3, 6, 36 L.Ed. 869; *Nixon v. Herndon*, 273 U.S. 536, 538, 47 S.Ct. 446, 71 L.Ed. 759; *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984; See *Pope v. Williams*, supra, 193 U.S. [621], 634, 24 S.Ct. [573, 576, 48 L.Ed. 817]. But the necessity of a showing of purposeful discrimination is no less in a case involving political fights than in any other." *Snowden v. Hughes*, 1944, 321 U.S. 1, 11, 64 S.Ct. 397, 402, 88 L.Ed. 497.

[Dismissal on Merits Affirmed]

On the merits, the district court found that, "Plaintiff failed to make out his case." Again, we agree.

According to the plaintiff's own testimony, the defendant had told him that, if he would come back he would, without any commitment, not have to answer the questions to which he objected. That was before any election involving

candidates for Congress, United States Senator, or Presidential Elector.

Further, the plaintiff testified that the only reason he was given a test on the Constitution was because of the fact that he had a place of business across the street from a similar business operated by the defendant's brother.

"Until I told him that I knew his brother and that I had a business across the street from him, everything went on all right. Until I told him that I knew his brother and that I had a business across the street from him. That's when he brought out this other card. He said, 'You have questions to answer.'"

• • • • •

"• • • He was very nice about it, until he found out that—like I stated before—that I had a business across the street from his brother and that's the only thing that I could say that's the cause of the whole thing."

Such a denial of registration, if admitted may be a violation of state law, but it does not constitute such "purposeful discrimination between persons or classes of persons" as would amount to a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment.² The judgment is therefore

Affirmed.

Dissent

CAMERON, Circuit Judge (dissenting).

I agree with the opinion of the majority that the appellant failed to make out a case on the merits. But I disagree with the conclusion it announces that the District Court of the United States had jurisdiction to try the case. Since my difference with the majority relates to a vital question touching the relationship of the states with the federal government in an important field, I am impelled to state briefly the reasons for my dissent.

2. *Snowden v. Hughes*, 1944, 321 U.S. 1, 10 and 11, 64 S.Ct. 397, 88 L.Ed. 497; See also, *Backus v. Fort Street Union Depot Company*, 1898, 169 U.S. 557, 569, et seq., 18 S.Ct. 445, 42 L.Ed. 853; *McCloskey v. Tobin*, 1920, 252 U.S. 107, 108, 40 S.Ct. 306, 64 L.Ed. 481.

I.

The majority opinion pays lip service to the principle that "Under our federal system the qualification of voters is left to the several states subject to some limitations imposed by the United States Constitution." But it intimates that the jurisdiction of the states over the elective franchise does not amount to much because of amendments to the Constitution since the War Between the States.

I think the correct rule on the subject is stated in *Darby v. Daniel*, D.C.S.D. Miss.1958, 168 F.Supp. 170, 176:

"Any consideration of the constitutionality of the challenged portions of this amendment begins with the fundamental fact that, under our constitutional system, the qualification of voters is a matter committed exclusively to the States. The Supreme Court has spoken on the subject in language as clear as it is decisive. Witness, for example, what it said in *Pope v. Williams*, 1904, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817:

"The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor v. Happersett*, 21 Wall. 162, 22 L.Ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper • • •."

following this quotation (168 F.Supp. 177-181) is a full discussion of the rights of the states to control election machinery, together with citation of supporting Supreme Court cases.

II.

The case of *Snowden v. Hughes*, 1944, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, is in my opinion, direct support for the position that the court below had no jurisdiction to try this case. The brief quotation in the majority opinion from that case is not sufficient to bring the holding of the Supreme Court into proper focus.

The Snowden case was discussed by us at some length in the case of *Simmons v. Whitaker*, 1958, 252 F.2d 224; and the more extended quotation from it at pages 229-231, as well as in the dissenting opinion in *Reddix v. Lucky*, 5 Cir., 1958, 252 F.2d 930, 939-940, demonstrate, in my opinion, that the holding of the Supreme Court in *Snowden* is directly opposite to that attributed to it by the majority opinion.

III.

The Act under which appellant invoked federal jurisdiction was one of a series concerning which the Supreme Court said in *Collins v. Hardyman*, 1950, 341 U.S. 651, 656, 71 S.Ct. 937, 939, 95 L.Ed. 1253:

"The Act was among the last of the reconstruction legislation to be based on the 'conquered province' theory which prevailed in Congress for a period following the Civil War."

The Supreme Court has held uniformly that this series of statutes, to be constitutional, must be given a narrow and limited application. The reason for this was thus set forth in the concurring opinion of Mr. Justice Stone in *Hague v. C. I. O.*, 1939, 307 U.S. 496, 521 et seq., 59 S.Ct. 954, 966, 83 L.Ed. 1423, where he discussed the Fourteenth Amendment which they were designed to implement:

"The reason for this narrow construction of the clause and consistently exhibited reluctance of this Court to enlarge its scope has been well understood since the decision of the *Slaughter-House Cases* [16 Wall. 36, 21 L.Ed. 394]. If its restraint upon state action were to be extended more than is needful to protect relationships between the

citizen and the national government, and if it were to be deemed to extend to those fundamental rights of person and property attached to citizenship by the common law and enactments of the states when the Amendment was adopted, * * * it would enlarge Congressional and judicial control of state action and multiply restrictions upon it whose nature, though difficult to anticipate with precision would be of sufficient gravity to cause serious apprehension for the rightful independence of local government."

The whole thesis of narrow construction of the so-called Civil Rights Statutes—to which this Court is so definitely committed—was further developed in the dissenting opinion in *Sharp v. Lucky*, 5 Cir., 1958, 252 F.2d 910, 915 et seq.

IV.

The case before us involves nothing but a local political brawl. To extend federal jurisdiction to such would spread so thin that energies of the handful of men constituting the Federal Judiciary that there would be no time left for the performance of their legitimate duties. It would, moreover, lend substance to the widespread feeling that "The Cult of the Cloth" is engaged, by some sort of boot-strap-lifting technique, in an effort to turn over to federal functionaries the most intimate prerogatives of local self-government in derogation of universally accepted tenets of State-Federal relationships. Such a concept, wherever it is given effect, cannot, in my opinion, fail to bring the whole federal judicial process into disrepute. So feeling, I cannot but record my unequivocal rejection of it.

EMPLOYMENT

Labor Unions—Federal Statutes

Vincent P. BRADY v. TRANS WORLD AIRLINES, INC., and the International Association of Machinists.

United States District Court, District of Delaware, October 28, 1958, 167 F.Supp. 469.

SUMMARY: A contract between an airlines company and a machinists union required good standing membership in the union as a condition of employment. It also provided that any

one who was to be discharged for failure to meet the condition could, within three days after notice, protest to the employer-union System Board of Adjustment, and that if no protest were filed within the stated time limit, the action would be considered "final and binding upon all parties concerned." An employee accused by the union of defaulting on certain payments was notified by the company that he was to be discharged. Following a protest to the Board which resulted in a decision adverse to him, the employee brought an action against both the company and the union in federal district court under the Railway Labor Act. The action sought a reversal of the Board decision, re-instatement of employment, back pay for the period of discharge, and damages for humiliation due to the discharge without cause. The court held that the quoted provision "vitiated the freedom of action to which the discharged employee was entitled in choosing his course" as between an appeal to the Board and an independent action, because under the pressure of the three-day limitation one might "grasp for relief almost blindly ignorant . . . of his legal position." Treating the protest to the Board as never having been entered, the court permitted plaintiff to enter an order staying or dismissing the court action without prejudice, from the effective date of which he would have three days to make a free election of forums. 156 F.Supp. 82 (D.Del. 1957). Following the decision of the United States Supreme Court in *Conley v. Gibson* [335 U.S. 41, 2 Race Rel. L. Rep. 1093 (1957)] reargument was ordered. On the basis of the *Conley* decision the court held that the Board, composed partly of representatives of the union, had no jurisdiction to determine finally a dispute essentially between the union and a union member. The court stated that the *Conley* ruling should not be limited to its facts but rather embraces all forms of discrimination, whether racial or not, and whether found in the bargaining agreement or in its administration. Leave was therefore granted plaintiff to amend his complaint so as to allege conduct that would set forth a cause of action subject to federal jurisdiction within the purview of the *Conley* decision.

FAMILY RELATIONS

Miscegenation—Louisiana

STATE of Louisiana v. James BROWN and Lucille Aymond.

Supreme Court of Louisiana, January 12, 1959, 108 So.2d 233.

SUMMARY: A Negro man and a white woman, indicted for habitually cohabiting, were tried in a Louisiana state court for violating a statute making marriage or habitual cohabitation between persons of white and Negro races a crime. The trial court overruled a motion to quash on the ground that the statute is unconstitutional in that it makes a particular course of conduct a crime when committed by persons of certain races only. After a charge to the jury defining "habitual cohabitation" as "access for the purpose of sexual intercourse as a matter of habit," defendants were convicted. On appeal, the Supreme Court of Louisiana held the statute constitutional under the state's police power to maintain the "purity of the races" and to prevent "propagation of half-breed children" who would find it difficult to obtain social acceptance and who would be burdened with (quoting the *School Segregation Cases*) "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be overcome." The court also relied on an earlier United States Supreme Court decision that a similar statute imposing the same punishment on each offending person, whether white or black, did not violate the equal protection clause. However, the convictions were reversed and the case remanded for a new trial, on the ground that "habitual cohabitation" should have been defined as "customary or repeated acts of sexual intercourse."

HAWTHORNE, Justice.

Defendants James Brown and Lucille Aymond were charged in a bill of indictment with the crime of miscegenation "in that they did habitually cohabit with each other, he being of the Negro race and she being of the White race, they having knowledge of their difference in race." They were tried jointly, convicted, and sentenced to serve one year in the state penitentiary. Both have appealed.

The statute under which appellants were charged, Article 79 of the Louisiana Criminal Code, provides:

"Miscegenation is the marriage or habitual cohabitation with knowledge of their difference in race, between a person of the Caucasian or white race and a person of the colored or negro race."

The statute then provides that whoever commits the crime miscegenation shall be imprisoned, with or without hard labor, for not more than five years.

Appellants filed a motion to quash the indictment on the ground that the statute under which they were being prosecuted was unconstitutional because it violates the Equal Protection and the Due Process provisions of the Louisiana and United States Constitutions, in that it make a particular course of conduct a crime when committed by persons of certain races only. The motion to quash was overruled, and Bill of Exception No. 1 was reserved.

[Within Police Power]

As we view the matter, marriage is a status controlled by the states, and statutes prohibiting intermarriage or cohabitation between persons of different races in no way violate the Equal Protection clauses of the state and federal Constitutions. See 16A C.J.S. Constitutional Law §§ 541, 543, pp. 474, 479-480. A state statute which prohibits intermarriage or cohabitation between members of different races we think falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with "a feeling of inferiority as to their status in the community that may affect their

hearts and minds in a way unlikely ever to be undone".¹

The United States Supreme Court had occasion to consider the identical question presented here in *Pace v. State of Alabama*, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207. In that case a Negro man and a white woman were indicted under a provision of the Code of Alabama for living together in a state of adultery or fornication. The Supreme Court, in considering whether the Alabama statute violated the Equal Protection clause of the Constitution and in holding that it did not, stated that the punishment of each offending person whether white or black is the same. This is true of the Louisiana statute here involved.

The next bill which we shall consider has merit and in our view entitles the appellants to a new trial. According to the bill the trial judge in charging the jury defined the term "cohabitation" as "access for the purpose of sexual intercourse," and defined "habitual cohabitation" as "access for the purpose of sexual intercourse as a matter of habit". Timely objection was made to this charge, and a bill of exception perfected.

[Never Interpreted]

So far as we can ascertain, this court has never had occasion to interpret the words "habitual cohabitation" as found in Article 79 of the Criminal Code. In interpreting these words we are to be governed by Article 3 of that Code, which provides:

"The articles of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purposes of the provision."

We recognize the fact that the commonly accepted definition of the word "cohabit" is to "dwell together." However, in defining the meaning of the word "cohabitation" as used in the statute here in question we must take into consideration the context in which the word is used in the statute and the purposes of the law's provisions.

1. This quotation is from *Brown v. Board of Education of Topeka*, 347 U.S., 483, 74 S.Ct. 686, 691, 98 L.Ed. 873.

Article 79 of the Criminal Code is based upon Act 206 of 1910, a concubinage statute. To us the word "cohabitation" as used in Article 79 means sexual relations or acts of sexual intercourse, and under this statute in our view, just as under the concubinage statute, if a person of the Caucasian and a person of the Negro race were living together under the same roof, it would constitute evidence of the crime of miscegenation for this would be strong if not convincing, evidence of habitual intercourse.

Article 79 is found under that subpart of the Code dealing with "sex offenses affecting family". The preceding article in that same subpart, Article 78, provides that incest is the marriage to, or *cohabitation* with, any ascendant or descendant, brother or sister, uncle or niece, aunt or nephew, with knowledge of their relationship. This court as far back as 1906 in the case of *State v. Freddy*, 117 La. 121, 41 So. 436, 437, had occasion to consider the word "cohabit" as used in the incest statute then in effect, and concluded in a well reasoned opinion that the meaning of the word "cohabit" was "simply that of sexual intercourse". The word "cohabitation" in the present incest statute has the same meaning, and we are convinced that its meaning in Article 79 is also the same.

In the miscegenation statute, Article 79, the word "cohabitation" is preceded by the adjective "habitual", and the crime denounced is the "habitual cohabitation with knowledge", etc. Webster's Dictionary defines "habitual" thus: "Of the nature of a habit; according to habit; established by, or repeated by force of, habit; customary; as, the *habitual* practice of sin; *habitual* drunkenness." As we see the matter, the words "habitual cohabitation" as used in Article 79 simply mean customary or repeated acts of sexual intercourse, and not merely an isolated case of intercourse.

[Reversible Error]

Obviously, when the trial judge charged the jury that "habitual cohabitation" meant "access for the purpose of sexual intercourse as a matter of habit", he committed reversible error, for under this charge an accused could be convicted of the crime of miscegenation without any evidence that sexual intercourse had ever occurred. Such is not the law.

Since we are remanding the case for a new trial, there is another bill of exception which we

should discuss because the circumstances under which it was reserved are likely to recur at a subsequent trial of these defendants. This is Bill of Exception No. 2.

The defendants were jointly tried, and at the trial the State offered in evidence and relied on a confession made by each. One of the grounds urged in defendants' motion for a new trial is that the State failed to prove the *corpus delicti*, and that the confessions of the defendants may not, in and of themselves, serve as a basis of a legal conviction; or, stated somewhat differently, that the confession of an accused standing alone will not warrant a legal conviction.

[Role of Corpus Delicti]

In the trial of every criminal case the State, to warrant a legal conviction of an accused, must prove the *corpus delicti*, of the fact that a crime has been committed. Without such proof no conviction will be permitted to stand. Underhill, *Criminal Evidence*, sec. 35, p. 42 (4th ed. 1935), states the rule as follows:

"Proof of the *corpus delicti* is essential to a conviction, must be proved beyond a reasonable doubt, and must exclude every hypothesis other than that a crime was committed in order to convict."

The same authority in discussing the fact that the *corpus delicti* may be proved by circumstantial evidence says:

"The *corpus delicti*, and all the elements thereof, may be proved by circumstantial evidence, from which the jury may reasonably infer that a crime has been committed. Such evidence must exclude every reasonable hypothesis except guilt, and be convincing to a moral certainty; and such proof of *corpus delicti* must be most convincing and satisfactory proof compatible with the nature of the case." *Id.*, sec. 37, p. 45.

Suspicion, rumor, gossip, or mere hearsay evidence is not sufficient to establish the proof of *corpus delicti*, and as to confessions we think 23 C.J.S. *Criminal Law* § 916, p. 183, clearly sets forth the rule of law which prevails in this state thus:

"Extrajudicial admissions, declarations, or confessions of accused are not of themselves sufficient to establish the *corpus delicti*.

Evidence aliunde such admissions, declarations, or confession is *required* in order to establish the corpus delicti." (Italics ours.)

See also *State v. Morgan*, 157 La. 962, 103 So. 278, 40 A.L.R. 458; *State v. Calloway*, 196 La. 496, 199 So. 403.

In 22 C.J.S. Criminal Law § 839, pp. 1471-1472, it is stated: "As a general rule it is required that the corpus delicti must first have been established before the confession of accused may be admissible, although by some authorities it is held that the order of proof is immaterial or is within the discretion of the trial court and that, if a confession is admitted and evidence which would have been sufficient to authorize its admission is subsequently introduced, the error, if any, is cured."

We think it is better and much fairer to follow the general rule in this state and to *require the establishment of the corpus delicti before the confessions of accused are admitted in evidence.*

Again, "• • • it is the general rule both under statutes and at common law that an extrajudicial confession does not warrant a conviction unless it is corroborated by independent evidence of the corpus delicti". 22 C.J.S. Criminal Law § 839, p. 1472.

In *State v. Morgan*, supra [157 La. 962, 103 So. 279], the defendant was charged with the offense of carnal knowledge, and in that case the State relied on a confession made by the accused. In reversing the conviction and remanding the case for a new trial this court said:

"The overwhelming weight of authority is to the effect that there cannot be a lawful conviction of a crime unless the corpus delicti is established; that is to say, unless it is shown that a crime has been committed by some one.

"Mr. Wharton, in his work on Criminal Law (11th Ed. vol. 1, p. 449, § 357), says:

"The general rule in this country is that the corpus delicti cannot be established by the confession of the accused, unsupported by corroborative evidence, or proof aliunde, and a conviction had upon such uncorroborated evidence cannot be sustained."

"In A. & E. E. of Law, vol. 6, p. 582, the rule in the United States is stated thus:

"But in this country the rule is well established that a conviction cannot be had on the extrajudicial confession of the defendant, unless corroborated by proof aliunde of the corpus delicti."

"And this seems to be the established rule of jurisprudence in a majority of the states of the Union.

"In *Bines v. State*, 118 Ga. 320, 45 S.E. 376, 68 L.R.A. 33, the court said:

"Before there can be a lawful conviction of a crime, the corpus delicti, that is, that the crime charged has been committed by someone, must be proved.

"The mere confession of the accused is not sufficient to establish the corpus delicti." This rule, says the court, is well established, in this country at least."

"The same rule prevails in Nebraska:

"There must be other evidence that a crime has actually been committed, the confession being used to connect the accused with the crime" proved. *Priest v. State*, 10 Neb. 393, 6 N.W. 468; *Smith v. State*, 17 Neb. 358, 22 N.W. 780.

"In *Stringfellow v. State*, 26 Miss. 157, 59 Am.Dec. 247, the court of Mississippi said:

"Where the corpus delicti is not proven by independent testimony, extrajudicial confessions of the accused are insufficient to warrant a conviction."

"The rule thus laid down is by no means universal. There are jurisdictions which hold to the contrary. So far as our research has gone, we have not been able to find a case in our own reports which passes upon the question.

"We prefer, however, to follow the rule, as definitely established—as we take it—by a great majority of the states, to the effect that an accused party cannot be legally convicted on his own uncorroborated confession without proof that a crime has been committed; in other words, without proof of the corpus delicti."

"The counsel for the state cite the cases

holding that the court will not review the sufficiency of the evidence if there was any evidence at all of the fact essential to conviction.

"We are not unmindful of the rule stated. It is not a question here of the sufficiency of the evidence. But the question is: Can an accused be legally convicted without any evidence at all, independent of the confession, establishing the fact that a crime had been committed?"

"This presents clearly a question of law."
• • •

"Beyond these confessions there was no other evidence, 'literally none at all,' to show that the crime had been committed, either by the accused or by any one else."
• • •

The holding in the Morgan case was subsequently approved by this court in *State v. Calloway*, supra [196 La. 496, 199 So. 406], in which we said:

"It is conceded that the jurisprudence of this State is well settled that the uncorroborated confession of an accused will not of itself sustain a conviction but that there must be other proof of the corpus delicti."

Although we have discussed the law applicable to this bill of exception, nevertheless we do not think that under the jurisprudence we can review the evidence taken at the trial in order to determine whether the corpus delicti has been established in this case, for although the evidence is incorporated in the transcript, it is not attached to and made a part of a bill of exception. In *State v. Gaines*, 223 La. 711, 66 So.2d 618, 620, this court said:

"This case was appealed from the Criminal District Court for the Parish of Orleans, and, as is customary in transcripts in appeals from that court, all of the testimony taken

during the trial has been placed in the transcript. Since all the testimony relating to the offering in evidence of the articles is in the transcript, counsel may have expected that we would consider it to determine whether the ruling of the trial judge on the admissibility of this evidence was correct. Any such expectation, of course, is futile, because for us to consider the testimony, although in the transcript, it must be presented in a bill of exception perfected in the manner prescribed by our Code of Criminal Procedure and the jurisprudence of this court.

"Under Article 498 of the Code of Criminal Procedure, LSA-R.S. 15:498, the bill of exception is grounded on the objection made to the ruling of the court on some purely incidental question arising during the progress of the trial, and involves the correctness of the conclusion drawn by the court from the facts recited in the bill. Under Article 500, LSA-R.S. 15:500, the bill of exception must show the circumstances under which, and the evidence upon which, the ruling complained of is based. For us to consider the testimony, counsel would have to incorporate the testimony in, or annex it to, or make it a part of, the bill of exception.

"We said in *State v. Honeycutt*, 218 La. 362, 49 So.2d 610, that it is well settled in the jurisprudence of this court that in a criminal case, even though the testimony may be taken, transcribed, and placed in the transcript, it cannot be considered by us and has no proper place in the record unless it is annexed to, and made a part of, a bill of exception timely perfected."

The convictions and sentences of the appellants are reversed and set aside, and the case is remanded to the district court for a new trial.

GOVERNMENTAL FACILITIES Golf Courses—Florida

Frank HAMPTON, Edward Joseph Norman, Devoye Austin Brown, and Charles M. Brown, etc. v. The CITY OF JACKSONVILLE, a Municipal Corporation in the State of Florida, County of Duval.

United States District Court, Southern District, Florida, Jacksonville Division, April 1, 1959, No. 4073-Civil-J.

SUMMARY: Negro citizens of Jacksonville, Florida, brought a class action in federal court against the city and the Board of City Commissioners to have policies and regulations against Negroes using two city-owned and controlled golf courses declared contrary to the United States Constitution and to obtain injunctive relief. Motion to quash summons and service thereof against the Board was granted on the ground that it is not a legal entity with capacity to be sued, but a motion by the city to dismiss was denied and plaintiffs' motion for summary judgment against the city was granted. The court declared the racially discriminatory practices complained of to be a denial of equal protection of the laws and permanently enjoined the city from refusing to allow Negroes to use city-owned golf courses upon the same basis and conditions as white persons. The court's orders on motions and summary judgment follow.

SIMPSON, District Judge.

ORDER ON MOTIONS

Counsel for the affected parties having been heard, after due notice, upon the matters herein disposed of, it is upon consideration

ORDERED and ADJUDGED:

1. The motion to quash summons and service thereof issued against "The Board of City Commissioners of the City of Jacksonville, All Their Agents, Employees and Servants" (filed July 28, 1958) is granted, said summons and the service thereon is ordered quashed and this cause is ordered dismissed as to "The Board of City Commissioners of the City of Jacksonville, All Their Agents, Employees and Servants", it appearing to the Court that said Board is not a legal entity and has no capacity to sue or be sued as such.

2. The motion of the City of Jacksonville (filed July 28, 1958) to strike portions of Paragraph I of the complaint is granted with respect to the concluding sentence of numbered paragraph I of the complaint, and the same is stricken. In lieu of striking the opening sentence of numbered paragraph I of the complaint, the reference to "Section 1331" is amended instantan by interlineation so that the same now refers to "Section 1343" of Title 28, U.S. Code.

3. The motion to dismiss of the defendant City of Jacksonville (filed July 28, 1958) is denied; the said defendant is required to file and serve its answer herein within 10 days from the date hereof.

DONE AND ORDERED at Jacksonville, Florida, September 17, 1958.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, AND SUMMARY FINAL JUDGMENT AWARDDING PERMANENT INJUNCTION

This cause having been argued and submitted by counsel for the respective parties upon plaintiffs' motion for summary judgment (filed October 10, 1958) and briefs for the respective parties having thereafter been filed by leave of Court, and the Court finding from the pleadings, depositions and admissions and affidavits on file, that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law, it is

ORDERED:

1. Plaintiffs' said motion for summary judgment is granted.

2. The policy, custom, usage and practice, and all regulations in aid or support thereof of the defendant The City of Jacksonville, its officers, agents, servants and employees, in refusing to permit Negro golfers to make use of its two city-

owned and controlled public golf courses, to-wit, Brentwood Municipal Golf Course and Hyde Park Municipal Golf Course, is contrary to the Fourteenth Amendment to the Constitution of the United States, in that said persons are thereby denied equal protection of the laws; therefore, the defendant, The City of Jacksonville, a municipal corporation, in the State of Florida, County of Duval, and its officers, agents, servants and employees, and their successors in office, are hereby permanently enjoined from refusing to allow the plaintiffs and other Negroes similarly situated to use said city-owned golf courses upon the same basis and upon the same conditions as white persons are permitted to use the same.

3. The plaintiffs shall have and recover of and from the defendant, the City of Jacksonville, a Municipal Corporation, their costs herein sustained, hereby taxed at \$_____.

4. Service of this permanent injunction by the delivery of a copy thereof to Messrs. William M. Madison, City Attorney, and Inman P. Crutchfield, City Solicitor, of the defendant City, shall be deemed to be sufficient notice of the entry thereof. Said counsel of record are directed to advise the Mayor-Commissioner of Jacksonville, the other City Commissioners of said City, and all affected officers and employees of said City, of the entry of this permanent injunction, and the terms thereof.

5. In order to insure adequate notice under the preceding paragraph, the effective date hereof is fixed at 12:01 A.M., Tuesday, April 7, 1959.

6. Jurisdiction of this cause is expressly retained for the purpose of the enforcement of the permanent injunction contained herein.

DONE AND ORDERED at Jacksonville, Florida, within said District, this April 1, 1959.

GOVERNMENTAL FACILITIES

Prisons—California

Cornelius NICHOLS v. Richard A. McGEE, Director, California State Department of Corrections, et al.

United States District Court, Northern District, California, Northern Division, January 23, 1959, 169 F. Supp. 721.

SUMMARY: A Negro inmate of a California state prison moved federal district court to proceed in forma pauperis with a proposed complaint seeking to have convened a three-judge court in order to restrain state prisons administrators from continuing to maintain racial segregation of prisoners in violation of the Fourteenth Amendment. Alternatively, plaintiff asked the court to require his transfer to another prison where such practices do not exist. He complained that this policy psychologically caused him a loss of self-respect and hindered his rehabilitation, and was not permissible in a publicly-supported institution, under the rule of the *School Segregation Cases*. The district judge decided that since no question of the validity of a statute was raised, there was no three-judge court issue. Proceeding to the merits, he found the complaint fatally defective for failure to show that plaintiff's federal rights could not be preserved in state court proceedings; further, the proposed complaint stated no federal cause of action, because the rationale of the *School Segregation Cases* cannot be extended to apply to the quite different problem of prisoner control in state penal institutions. The motion to proceed in forma pauperis was therefore denied.

HALBERT, District Judge.

Plaintiff has submitted to this Court a complaint, which is accompanied by a motion in

which he asserts that he is, by reason of his poverty, entitled to proceed in forma pauperis. By his motion he seeks leave to so proceed.

Leave to proceed in forma pauperis is a

privilege and not a right (*Clough v. Hunter*, 10 Cir., 191 F.2d 516; *Willis v. Utecht*, 8 Cir., 185 F.2d 210; *Johnson v. Hunter*, 10 Cir., 144 F.2d 565; *Prince v. Klune*, 80 U.S.App.D.C. 31, 148 F.2d 18; and *Dorsey v. Gill*, 80 U.S.App.D.C. 9, 148 F.2d 857), and a duty is imposed on this Court to examine any motion seeking leave to proceed in forma pauperis, in the light of the documents submitted in connection with it, to determine whether the proposed proceeding has merit. If, after an examination of the proposed proceeding, it is apparent that it is without merit, the Court is duty bound to deny the motion seeking leave to proceed in forma pauperis (*Higgins v. Steele*, 8 Cir., 195 F.2d 366; *Huffman v. Smith*, 9 Cir., 172 F.2d 129; *Tate v. People of State of California*, 9 Cir., 187 F.2d 98; *Gilmore v. United States*, 8 Cir., 131 F.2d 873; and *Fisher v. Cushman*, 9 Cir., 99 F.2d 918). It is with these fundamental rules in mind that the Court has examined and considered the complaint, which plaintiff, by his motion, seeks to file.

[Three-Judge Court Sought]

By his proposed complaint, plaintiff seeks to convene a three-judge court (Title 28 U.S.C.A. § 2281) for the purpose of restraining respondents (State officials charged with the administration of California prisons) from continuing certain practices which, it is alleged, are violative of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution. Should such relief be denied, plaintiff alternatively asks this Court to require his transfer to another prison where such practices do not exist.

Plaintiff is presently an inmate of the California State Prison at Folsom, in which said prison he is confined under the California indeterminate sentence law for the crime of attempted robbery while armed. The complaint does not question the validity of plaintiff's commitment, but alleges that while lawfully confined he is subjected to systematic segregation, discrimination and degradation solely on account of his race.

Specifically, it is alleged that plaintiff is required to join an exclusively Negro line formation when proceeding to his assigned cellblock for daily lockup; that he is there lodged in an exclusively Negro cell within said cellblock; that he is required to join an exclusively Negro

line formation for tally purposes; that he is required to join an exclusively Negro line when proceeding into the prison dining halls; and that he is required to eat in a walled-off and exclusively Negro compartment in said dining halls. In addition to its being segregated, plaintiff alleges that the Negro dining area would be dangerous in the event of fire or disorder, as it is located furthest from the available exits.

Plaintiff admits that this segregation is neither required, nor authorized, by the codified laws or the statutes of California, but that it is maintained at Folsom Prison pursuant to the oral directions of respondents. It is argued, however, that such segregation is State action which, psychologically, causes a loss of self-respect, thereby making it difficult for plaintiff to effect the same degree of rehabilitation possible for unsegregated prisoners of other races and, therefore, that this is not permissible in a public, tax supported penal institution of the State of California. In support of this argument, plaintiff cites *Brown v. Board of Education of Topeka*, Shawnee County, Kan., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873.

[Federal Jurisdiction Not Presumed]

Plaintiff has been before this Court previously, and it has been pointed out to him that the jurisdiction of this Court is limited and may never be presumed, but must, in fact, be affirmatively alleged and shown in all cases (*McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135, and *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462). This is especially true where, as here, jurisdiction is alleged to exist under § 2281 of Title 28, U.S.C.A. (See *Hague v. C. I. O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, and *Gibbs v. Buck*, 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111).

An examination of the factual allegations of plaintiff's proposed complaint, which, for the purposes of this motion are assumed to be true, shows that plaintiff is seeking to draw into issue the constitutionality not of a statute, but of a departmental policy or regulation. Where the issue is one of actual discrimination, rather than the constitutionality of a State law, the issue is factual and may not properly be addressed to a three-judge court (*Ex parte Bransford*, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249; *Sealy v.*

Department of Public Instruction of Pennsylvania, 3 Cir., 252 F.2d 898, certiorari denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1149; *Wichita Falls Junior College Dist. v. Battle*, 5 Cir., 204 F.2d 632, certiorari denied 347 U.S. 974, 74 S.Ct. 783, 98 L.Ed. 1114; and *Wilson v. City of Paducah*, D.C., 100 F.Supp. 116, for the explicit language of § 2281 of Title 28, U.S.C.A., limits the jurisdiction of a three-judge court to consideration of statutes (See also *Sweeney v. State Board of Public Assistance*, D.C., 36 F.Supp. 171, appeal denied D.C., 36 F.Supp. 973, affirmed 3 Cir., 119 F.2d 1023, certiorari denied 314 U.S. 611, 62 S.Ct. 74, 86 L.Ed. 491, and *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 54 S.Ct. 565, 78 L.Ed. 1088).

As no issue is presented which might properly be presented to a three-judge court, this Court may proceed to an individual determination of the merits of plaintiff's proposed complaint (*Lee v. Roseberry*, D.C., 94 F.Supp. 324).

[Complaint Fatally Defective]

A fatal defect of plaintiff's proposed complaint, especially in view of the extraordinary relief which he prays for, is his failure to show that the asserted Federal rights, which he contends have been infringed, could not be preserved by proper proceedings in the State courts (*Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002, and *Wreiole v. Waterfront Commission of New York Harbor*, D.C., 132 F.Supp. 166). In this connection it should be noted that public officials are presumed to do their duty and do not act in an unauthorized manner (*Rawls v. United States*, 10 Cir., 166 F.2d 532, and *Wall v. Hudspeth*, 10 Cir., 108 F.2d 865). This Court must assume, and it does

assume, that the courts of the State of California will do their duty and fully protect all of the legal rights secured to the plaintiff under the Constitution and the laws of the United States (See *Hawk v. Jones*, 8 Cir., 160 F.2d 807; *Pebbley v. Knotts*, D.C., 95 F.Supp. 283; and *Johnson v. Wilson*, D.C., 45 F.Supp. 597).

[Brown Rationale Inapplicable]

Even if recourse had first been had to the courts of California, plaintiff's proposed complaint could state no cause of action in this Court. By no parity of reasoning can the rationale of *Brown v. Board of Education*, supra, be extended to State penal institutions where the inmates, and their control, pose difficulties not found in educational systems. Federal courts have long been loath to interfere in the administration of State prisons (*United States ex rel. Wagner v. Ragen*, 7 Cir., 213 F.2d 294; *Adams v. Ellis*, 5 Cir., 197 F.2d 483; *Curtis v. Jacques*, D.C., 130 F.Supp. 920; and *United States ex rel. Yaris v. Shaughnessy*, D.C., 112 F.Supp. 143). The acts complained of in the instant complaint do not show a sufficiently grave and substantial interference with any right of plaintiff, which reaches such constitutional magnitude as would justify the intervention of this Court (See e. g., *Piccoli v. Board of Trustees and Warden of State Prison*, D.C., 87 F.Supp. 672).

For the reasons, which have been noted above, plaintiff could avail himself nothing by filing his proposed complaint. It follows then that his motion seeking permission to proceed in forma pauperis must be denied.

It is, therefore, ordered that plaintiff's motion to file his proposed complaint in forma pauperis be, and the same is, hereby denied.

INDIAN RESERVATIONS Jurisdiction—South Dakota

STATE of South Dakota ex rel. Raymond Edward Hollow Horn Bear v. G. Norton JAMESON, Warden, South Dakota Penitentiary.

Supreme Court of South Dakota, March 3, 1959, 95 N.W.2d 181.

SUMMARY: An enrolled tribal member of the Pine Ridge Indian Reservation, South Dakota, applied to a state court for habeas corpus, alleging that the Circuit Court of Bennett County, which had convicted him of forgery, lacked jurisdiction because the offense was committed

within "Indian Country," and therefore was subject to tribal court jurisdiction under federal statutes. The writ was denied, and on appeal the Supreme Court of South Dakota affirmed. The court found that although the locus of the offense is within the original exterior boundaries of the reservation, Congress had later authorized the sale and disposition of reservation lands which embraced the locus of the offense. Though recognizing decisions holding that land allotted to Indians remained Indian lands and a part of the reservation within "Indian Country" so long as the government held it in trust for the benefit of the allottee and his heirs, the court found that Congress intended that after Indian title to allotted tracts had been extinguished, such tracts should cease both to be part of the diminished or "closed" reservation and of "Indian Country." Indian title to the allotted land which constituted the locus of the offense in this case having been extinguished, the court concluded that it was not within "Indian Country" at the time of the commission of the offense and that, therefore, the trial court had jurisdiction.

INDIANS

Indian Lands—Montana

UNITED STATES of America v. C. E. FRISBEE et al.

United States District Court, Montana, Great Falls Division, September 16, 1958, 165 F.Supp. 883.

SUMMARY: The United States, claiming to own in fee simple certain land held in trust for an Indian allottee, brought an action in federal district court to quiet title against individuals claiming it. In 1918 the Secretary of the Interior had issued a trust patent to the Indian allottee, under which the United States undertook to hold the land in trust for her for 25 years, free from state taxes. However, later the same year the Secretary issued a fee patent to this allottee without her application, under his statutory authority to issue patents in fee simple before expiration of the patent period "if satisfied that any Indian allottee is competent and capable of managing his or her affairs." She executed a receipt for the patent, recorded it, and subsequently mortgaged some of the land, covenanting that she was lawfully seized of it in fee simple. Upon her failure to pay taxes on the unmortgaged land, it was sold at a 1921 tax sale and later conveyed to the individual defendants. In 1954, the Commissioner of Indian Affairs, proceeding under the Cancellation Acts, ordered the fee patent cancelled because issued without consent of the allottee, and issued a new trust patent to the allottee. The court held that the allottee's actions immediately following the issuance of the patent showed her consent, and that even in the absence of consent this patent was not subject to cancellation because the Cancellation Acts are not applicable to lands sold for unpaid taxes after a mortgage or deed to any part of the land has been executed by the patentee.

INDIANS

Indian Lands—New York

ST. REGIS TRIBE OF MOHAWK INDIANS, by Norman Tarbell et al., on Behalf of All St. Regis Indians v. STATE of New York.

Court of Appeals of New York, June 25, 1958, 5 N.Y.2d 24, 177 N.Y.S.2d 289.

SUMMARY: The St. Regis Tribe of the Mohawk Indians filed a claim for \$33,800,000 against New York State in the state court of claims, alleging ownership of Barnhart's Island in the St.

Lawrence River, which the state had appropriated for a power project. The state defended on the basis of an 1856 legislative appropriation of \$5,960 to pay the Indians for this and another island, and a ledger entry by the state comptroller that the money had been so paid. The trial court denied the state's motion to dismiss on the grounds that a cause of action was not stated and that any claim which had existed had been released, finding that these were triable issues of fact. 4 Misc. 2d 110, 158 N.Y.S.2d 540. The Appellate Division reversed and dismissed the claim on the grounds that the Indians lacked legal title and that the record showed a release of whatever claim they had. 5 A.D.2d 117, 168 N.Y.S.2d 894. The New York Court of Appeals affirmed, holding that any claim to the land the Indians may have had on the basis of pre-1856 treaties had been extinguished by the payment of that year, and that the state was not bound as a matter of due process to compensate the Indians for the bare right of occupancy. The court overruled claimants' contention that the 1856 payment could not legally satisfy their claims because it conflicted with the federal Indian Intercourse Act, holding that Act inapplicable to the state. [Note: The Supreme Court of the United States has denied certiorari. No. 613, February 24, 1959, 79 S.Ct. 586, 4 Race Rel. L. Rep. 13 (1959). A petition for rehearing was also denied June 1, 1959. 4 Race Rel. L. Rep. 251, *supra*].

INDIANS

Indian Lands—New York

TUSCARORA INDIAN NATION v. FEDERAL POWER COMMISSION, Power Authority of the State of New York, Intervenor.

United States Court of Appeals, District of Columbia Circuit, Decided November 14, 1958, Order March 24, 1959, 265 F.2d 338.

SUMMARY: The Tuscarora Indian Nation, in April, 1958, brought an action in federal court in New York, seeking an injunction and a declaratory judgment against the appropriation of tribal lands by the State Power Authority. After a temporary injunction had been granted, the court granted defendant's motion for a change of venue to the district where the disputed lands are situated. *Tuscarora Nation of Indians v. Power Authority of the State of New York*, 161 F. Supp. 702, 3 Race Rel. L. Rep. 715 (S.D. N.Y. 1958). In the Western District of New York the complaint was dismissed. That court held that if the fee to the lands was not in the state, it was privately held and subject to the state's power of eminent domain and that the New York Court of Claims was the proper forum to determine the amount of just compensation for the taking. 164 F. Supp. 107, 3 Race Rel. L. Rep. 1021 (W.D. N.Y. 1958). On appeal, the United States Court of Appeals for the Second Circuit held that the exercise of eminent domain must be by the United States through Congress, whose authorization for the taking could be inferred from the size of the Niagara Power Project and its proximity to appellants' reservation. But since the Authority could exercise the power only as Congress had prescribed—i.e., through proceedings in the state or federal district courts—it was held improper for the Authority to proceed under a state law permitting appropriation and eviction without judicial proceedings. The district court judgment dismissing the complaint, and thereby preventing a declaration of rights, was reversed. 257 F.2d 885 (2d Cir. 1958); *execution of mandate stayed*, 79 S.Ct. 4, 3 Race Rel. L. Rep. 1122 (1958); *certiorari denied*, 79 S.Ct. 66, 3 Race Rel. L. Rep. 1132 (1958). Meanwhile, the Indian nation petitioned the United States Court of Appeals for the District of Columbia Circuit to review the order of the Federal Power Commission, dated January 30, 1958, issuing the license to the Authority for the project. The court held that the Commission had no power to issue a license permitting construction of a reservoir within the reservation unless it could make a finding (as yet not done), required by the Federal Power Act, that the license would not "interfere or be inconsistent with the purpose for which such reservation was created or acquired." Therefore,

the case was remanded to the Commission for determination of whether that finding would be justified. On subsequent report of FPC that such finding could not be made, the case was remanded to amend licensing order to exclude condemnation of Indians' land. (The United States Supreme Court granted certiorari June 22, 1959, 4 Race Rel. L. Rep. 252, *supra*.) Below are excerpts from the court's opinion relating to the legal status of Indians, and the court's final order.

Before PRETTYMAN, Chief Judge, and EDGERTON and DANAHER, Circuit Judges.

PRETTYMAN, Chief Judge.

The issue here is whether the New York Power Authority has a valid license from the Federal Power Commission to build a dam that will flood certain lands of the Tuscarora Indians. We are of opinion that the case must be remanded to the Federal Power Commission for further consideration. In order that the litigation may not be delayed more than is necessary, we shall state in this memorandum the propositions which lead to our conclusion, without taking the time to complete an opinion in the customary form.

I

The relationship of the United States to the Tuscarora Indians resembles a guardianship, and control over the alienation of their lands is in the United States. A long-existing statute¹ provides: "No purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." (Emphasis added.) The point is further made specific in regard to lands within Indian reservations in the State of New York by a statute adopted by the Congress in 1950,² which conferred upon the courts of New York jurisdiction of certain actions involving Indians but contained the proviso "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York".

Dealings with the Indians are within a special clause of the Constitution, conferring power on the Congress to regulate commerce with the Indian tribes. The relationship between the United States and members of Indian tribes resembles that of guardian and ward. Alienation of Indian lands, a prerogative of the United

States as guardian, requires congressional consent. We do not find congressional consent in the 1957 statute or in any other statute except the Federal Power Act. We do find that, in allowing the Commission under Section 4(e) of the Federal Power Act to deal with "public lands and reservations" as defined in Section 3(2), Congress was exercising not only its power under the property clause of the Constitution but also its power to regulate commerce with the Indian tribes and, therefore, to allow alienation of the land here involved.

V

On the record before us it does not appear that the acquisition of the Tuscarora land is a matter of necessity to the construction of the project to the full extent of its planned scope. The acquisition is desirable solely from the standpoint of economy; apparently acquisition and construction costs would be lower here than at any other place in the area. We fail to find anywhere an inclination of the Congress to save costs to its sole licensee for this enormous power project at the expense of Indians living on an Indian reservation.

VII

We are of opinion that the Commission cannot issue a license for the purpose of constructing a reservoir on these tribal lands embraced within the Tuscarora reservation, unless it can make the finding required by the proviso in Section 4(e) of the Federal Power Act. We will remand the case to the Commission that it may explore the possibility of making that finding. If the Commission concludes that the finding can be made and makes it, or proposes to make it, it will amend its January 30th order to include that finding. We retain jurisdiction of the cause pending receipt from the Commission of notice of its action pursuant to this remand. In order that the litigation may not be prolonged unduly, our remand order will re-

1. Rev.Stat. § 2116 (1875), 25 U.S.C.A. § 177.

2. 64 Stat. 845, 25 U.S.C.A. § 233.

quire that the Commission report to us within fifteen days hereafter regarding its action pursuant to the remand.

So ordered.

ORDER

PER CURIAM.

Whereas we held in our opinion filed herein November 14, 1958, that the finding required by Section 4(e) of the Federal Power Act, 16 U.S.C.A. § 797(e), is necessary to the validity of a license purporting to authorize the condemnation of Tuscarora Indian tribal lands, and remanded this case to the Federal Power Commission for further proceedings;

And Whereas on February 2, 1959, after extensive hearings, the Commission, in an opinion and finding, reported to this court that under the facts presented it could not make the finding required;

And Whereas the petitioner subsequently moved for final determination of issues, the respondent moved for reconsideration and for final determination of issues, the intervenor moved for renewal of its petition for reconsideration of interlocutory holdings, and the United States, having been admitted as *amicus curiae*, moved for reconsideration and for oral argument, and the court having duly considered the foregoing motions and report of the Commission;

Now, therefore, it is ordered by the court that the license issued by the Commission to the Power Authority of the State of New York for the Niagara River Project is approved except in so far as it would authorize the condemnation of Tuscarora Indian tribal lands for reservoir purposes, and further ordered that this case be remanded to the Commission with instructions to amend its licensing order so as to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes.

INDIANS

Taxation—South Dakota

Albert J. BARTA, John E. Barta and Charles K. Failing v. OGLALA SIOUX TRIBE OF PINE RIDGE RESERVATION OF SOUTH DAKOTA, and James Iron Cloud.

United States Court of Appeals, Eighth Circuit, October 15, 1958, 259 F.2d 553.

SUMMARY: The Oglala Sioux Tribe of Indians, through resolution of its Tribal Council, levied a license tax on non-members of the tribe leasing trust lands located within a certain reservation of the tribe in South Dakota. Five collection suits against lessees were instituted in federal district court, two in the name of the tribe and three in the name of the United States. Verdicts for the plaintiffs were directed and money judgments were entered. *Oglala Sioux Tribe of the Pine Ridge Reservation, S.D. v. Barta*, 146 F.Supp. 917 (D. S.D. 1956). The Court of Appeals for the Eighth Circuit dismissed appeals in the first two actions for not having been filed within the time limited by the Federal Rules. Judgments in the last three cases were affirmed. The court held that the government's obligations to its Indian wards and its interests in the trust property and the tax involved supported the bringing of the actions in the name of the United States (even though they might also have been maintained by the tribes) and that the district court therefore had original jurisdiction under the Judicial Code. Rejecting appellants' contention that this levy was violative of their rights under the Fifth and Fourteenth Amendments, the court held that since Indian tribes are not states and were not acting as agencies of the federal government, the cited amendments have no application to their legislative actions. The court also rejected the argument that appellants' rights were violated by taxation without representation, stating that the property rights of a non-resident are subject to taxes "levied uniformly on all lessees of these tribal trust lands."

INDIANS

Taxation, Voting—New York

STATE TAX COMMISSION v. W. L. BARNES and all St. Regis Indians

County Court, Franklin County, New York, October 17, 1958, 178 N.Y.S.2d 932. Supreme Court, App. Div., 3rd Dept., April 23, 1959, 185 N.Y.S.2d 781.

SUMMARY: In an action in a New York state court brought by the State Tax Commission against St. Regis Indians, it was held that defendants' status as Indians residing on a reservation did not exempt them from payment of state income taxes, inasmuch as they were New York residents. Their income is taxable, the court stated, even though their relationship to the United States resembles that of a ward to its guardian, since by federal statute the civil laws of the state apply to Indians and the duties exacted from them are the same as from other residents; and approval of the United States is not necessary because the tax power is incidental to sovereignty. As a dictum, the court stated that, income tax money being partially used for educational purposes, Indians must be allowed the same voting privileges as others in the school district wherein they reside. On April 23, the Supreme Court Appellate division, granted a motion to dismiss an appeal, by default.

ORGANIZATIONS

NAACP—Alabama

Ex parte NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE. In re STATE ex rel. John PATTERSON, Atty. Gen. v. NAACP.

Supreme Court of Alabama, February 12, 1959, 109 So.2d 138.

SUMMARY: The Attorney General of Alabama brought suit in an Alabama state court to restrain the National Association for the Advancement of Colored People from doing business in Alabama without complying with state laws requiring registration of foreign corporations. A temporary restraining order was issued against the Association. 1 Race Rel. L. Rep. 707 (1956). Later, the court ordered the Association to produce certain books, papers and documents, including a membership list, and on refusal to produce the latter, the Association was adjudged in contempt and fined. 1 Race Rel. L. Rep. 917 (1956). The Alabama Supreme Court denied certiorari to review the contempt order. 1 Race Rel. L. Rep. 919 and 2 Race Rel. L. Rep. 177 (1956). The United States Supreme Court granted certiorari, and subsequently found that "the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interest privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." The judgment of contempt and fine were dissolved and the case remanded. 357 U.S. 449, 3 Race Rel. L. Rep. 611 (1958). On remand, the Association moved the Supreme Court of Alabama to send the United States Supreme Court mandate to the original state trial court so that a hearing might be had on the merits of the injunction that had been issued. The motion was overruled and the judgment was again affirmed. The court, although recognizing that the Association was not in contempt for refusing to submit its membership lists, held that it was still in contempt for failure to produce the other "certain books, papers and documents" described in the lower court's order. [See also *NAACP v. Jones*, 109 So.2d 140, 4 Race Rel. L. Rep. 376, *infra*, (Ala. 1959)].

PER CURIAM.

This cause comes before this tribunal on mandate from the Supreme Court of the United

States, *N.A.A.C.P. v. State of Ala.*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488; this Court having previously denied certiorari, but having ex-

pressed its views as to the merits of the petitioner's claim of a constitutional right to refuse production of its membership lists. 265 Ala. 349, 91 So.2d 214.

While the Supreme Court of the United States, in its opinion *supra*, seems to recognize its lack of jurisdiction over matters of state ("non-federal") procedure, it nevertheless assumed jurisdiction *quoad hoc* ("for this turn", as that phrase has been sometimes defined), and this upon the premise that the interpretation by this Court of its own procedural rules was erroneous, or that petitioner was not sufficiently apprised of this Court's "novel" interpretation of those rules in the decision under review.

Lest there be no misapprehension on the part of the bench and bar of Alabama, we here reaffirm the well recognized and uniform pronouncements of this Court with respect to the functions and limitations of common-law certiorari, and the distinctions between that and other methods of review. 265 Ala. 349, 91 So.2d 214, *supra*. As we stated in *American Federation of State, County and Municipal Employees v. Dawkins*, 268 Ala.—, 104 So.2d 827, 834: "We cannot hurdle or make shipwreck of well-known rules of procedure in order to accommodate a single case."

[U.S. Supreme Court Decision]

The decision of the Federal Supreme Court seems to have proceeded upon a hearing there, upon consideration of allegations there made, and upon showings of evidentiary matters and contentions, much of which were never before this Court. It thereupon reversed the judgment of this Court and remanded the case for further proceedings "not inconsistent with" the opinion of that Court.

The first question before this Court on original consideration was whether or not there existed a *prima facie* right of refusal on the part of the petitioner. *Ex parte Boscowitz*, 84 Ala. 463, 4 So. 279. For the purposes of our decision we limited our opinion on the merits to petitioner's right of refusal to submit its membership lists. This question has been answered by the Supreme Court of the United States in the negative, by holding the petitioner to have a qualified right under the facts appearing before that Court, subject to an overriding interest of the State. The finding of that Court was to the effect that the State of Alabama had failed, at

the hearing, to show such an overriding interest and ruled petitioner was not in contempt for failure to produce the lists.

This brings up the second question for review now, viz.: the scope of the order of the trial court and the facts apparent on the face of the record. Petitioner contends that it was held in contempt for refusal to produce its membership lists. As to the petitioner's right of said refusal, the Supreme Court of the United States, as stated, has settled that point, and no further discussion would be proper. However, petitioner's contention as to this sole reason it was held in contempt is not borne out by the record and the Supreme Court of the United States in its opinion, *supra*, seems to have rested decision on this mistaken premise. We wish to here point out that the record reveals that petitioner was held in contempt for "its willful and deliberate refusal to produce the documents described in the former order of the court in this cause" (orders dated July 25 and July 31, 1956).

Again the record before us shows: " * * * counsel for respondent objected to the motion to produce and the court ruled, as shown by its order on file, that certain books, papers and documents mentioned in the motion * * * should be brought into court. * * * " (Order dated July 25, 1956).

The Supreme Court of the United States, as to the entire order to produce, stated: " * * * petitioner * * * has apparently complied satisfactorily with the production order, except for the membership lists * * *. These last items would not on this record appear subject to constitutional challenge and have been furnished." [357 U.S. 449, 78 S.Ct. 1173].

We cannot presume, as did the Supreme Court of the United States, that the petitioner did furnish the other items listed, in view of the finding of the circuit court on the face of its order that it did not; for, as we held on *Ex parte Dickens*, 162 Ala. 272, 50 So. 218, 222 (and approved by the Supreme Court of the United States in its review): "Following the rules above stated, the chancellor has found the facts that said Dickens has not, in good faith, obeyed the orders of the court, but, on the contrary, has filed a false and fraudulent account; and we must take his finding as being correct. Those being the facts, said Dickens was properly adjudged to be in contempt * * *."

[N.A.A.C.P. Still in Contempt]

There is nothing in the record here before us upon which we could bottom a conclusion that petitioner has apparently complied satisfactorily with the production order, except for the membership lists.

Being so—and premitting further discussion of the claimed contempt of petitioner for refusal to submit the membership lists—it is clear the petitioner is still in contempt for its failure to produce the other “certain books, papers and documents” described in the lower court’s order, thereby necessitating another affirmance of the judgment.

Petitioner has filed a motion praying that this Court will cause to be sent to the Circuit Court of Montgomery County, Alabama, the mandate of the United States Supreme Court so that petitioner may proceed to have a hearing on the merits of the injunction issued by said Circuit Court.

It results from the foregoing considerations that the motion is not well taken and is overruled and the judgment is again affirmed.

Motion overruled and judgment affirmed after remandment.

All the Justices concur.

ORGANIZATIONS NAACP—Arkansas

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a corporation v. Bruce BENNETT, Attorney General of the State of Arkansas et al.

United States District Court, Eastern District, Arkansas, Western Division, January 17, 1959, Civil Action File No. 3664.

SUMMARY: The National Association for the Advancement of Colored People brought suit in a federal district court in Arkansas against the Arkansas Attorney General and others to restrain enforcement of a state barratry statute [3 Race Rel. L. Rep. 1053 (1958)] and a statute authorizing state officials to compel production of records of organizations engaged in activities designed to interfere with state control and operation of schools [3 Race Rel. L. Rep. 1056 (1958)]. Defendants moved to stay proceedings until state courts could rule upon the validity of the statutes involved. Citing United States Supreme Court rulings that, where the constitutionality of an unconstrued statute is attacked in a federal district court as violative of the Federal Constitution, federal court proceedings should be stayed until state courts have construed the meaning and scope of the statute, the three-judge district court held that comity in federal-state judicial relations required that this doctrine be applied even if it be assumed that the statutes in question were obviously unconstitutional. The motion to stay was therefore granted, the court retaining “jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted.”

Before Judges SANBORN, MILLER, and HENLEY.

The procedural problem presented by the motions to stay further proceedings in this action until the courts of the State of Arkansas have an opportunity to interpret and rule upon the validity of the statutes of that State which are under attack, is whether this federal three-judge court shall hear this case on the merits and determine the question of the constitutionality of the statutes in suit, or whether, in

the exercise of its equitable powers and out of regard for the independence of the State and its courts, this court should, for the time being, merely retain jurisdiction of the case and remit the plaintiff to its remedies in the courts of the State.

It seems obvious that whatever procedural pathway is pursued by the plaintiff, the case will eventually end in the Supreme Court of the

United States, and that the ultimate result will be the same whether the plaintiff's claim of the unconstitutionality of these statutes is heard and ruled upon by this court or by the courts of the State.

[*General Doctrine Stated*]

The general doctrine established by the Supreme Court in many cases is that where the constitutionality of an unconstituted state statute is attacked in a federal court as violative of the Federal Constitution, the court should stay its hand, but retain jurisdiction of the case until all doubts as to the meaning and scope of the statute have been resolved in the courts of the State. Three of the leading cases are: *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496; *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101; and *Albertson v. Millard*, 345 U.S. 242.

In *Spector Motor Service, Inc. v. McLaughlin*, the Supreme Court said (page 105 of 323 U.S.):

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. *Railroad Commission v. Pullman Co.*, supra [312 U.S. 496]; *Chicago v. Fieldcrest Dairies*, 316 U.S. 168; *In re Central R. Co. of New Jersey*, 136 F.2d 633. See also *Burford v. Sun Oil Co.*, 319 U.S. 315; *Meredith v. Winter Haven*, 320 U.S. 228, 235; *Green v. Phillips Petroleum Co.*, 119 F.2d 466; *Findley v. Odland*, 127 F.2d 948; *United States v. 150.29 Acres of Land*, 135 F.2d 878. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication."

In *Albertson v. Millard*, which involved the Michigan Communist Control Bill, requiring a

registration of Communists, the Communist Party, and Communist front organizations, a three-judge District Court ruled upon the constitutionality of the Act. The Supreme Court said (pages 244-245 of 345 U.S.):

"Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state courts is binding upon federal courts. There has been no interpretation of this statute by the state courts. The absence of such construction stems from the fact this action in federal court was commenced only five days after the statute became law.

"There is pending in the Circuit Court for Wayne County, Michigan, a bill seeking a declaratory judgment that the Act is unconstitutional, both on federal and state grounds. That action is being held in abeyance pending our mandate and decision in this case.

"We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action. See *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *American Federation of Labor v. Watson*, 327 U.S. 582 (1946); and *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944).

"The judgment is vacated and the cause remanded to the District Court for the Eastern District of Michigan with directions to vacate the restraining order it issued and to hold the proceedings in abeyance a reasonable time pending construction of the statute by the state courts either in pending litigation or other litigation which may be instituted."

The most recent case in the Supreme Court appears to be *Government and Civic Employees Organizing Committee, CIO, v. Windsor*, 353 U.S. 364. The Supreme Court said on page 366:

"We do not reach the constitutional issues. In an action brought to restrain the enforcement of a state statute on constitutional grounds, the federal court should retain jurisdiction until a definitive determination of local law questions is obtained from the local courts. One policy served by that practice is that of not passing on constitutional questions in situations

where an authoritative interpretation of state law may avoid the constitutional issues. *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105."

[Contention For Exception]

The plaintiff does not question the existence of the general doctrine, but contends that the instant case does not come within it, because the statutes involved are unambiguous and unquestionably unconstitutional as violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. There is respectable authority for the proposition that where the unconstitutionality of a statute is clear, it is unnecessary for the court to await state court adjudication.

In *National Association For the Advancement of Colored People v. Patty, D. C. E.D.Va.*, 159 F.Supp. 503, Circuit Judge Soper, speaking for the majority of a three-judge court (on page 523) said:

"* * * As heretofore noted, the problem for determination is essentially a federal question with no peculiarities of local law. Where the statute is free from ambiguity and there remains no reasonable interpreta-

tion which will render it constitutional, there are compelling reasons to bring about an expeditious and final ascertainment of the constitutionality of these statutes to the end that a multiplicity of similar actions, may, if possible, be avoided."

[Deference to State Courts]

Assuming, without deciding, that the unconstitutionality of the Arkansas statutes in suit is obvious, as the plaintiffs claim, it reasonably can be believed that it would be more wholesome and more logical to permit the courts of Arkansas to rule upon their validity in the first instance than to have this court do so, and that it would be more in harmony with the philosophy underlying the doctrine established by the Supreme Court relative to the federal courts affording the state courts an opportunity to pass upon the construction and effect of local statutes.

We think that under circumstances such as this court is confronted with, it has discretion as to whether it will proceed to an adjudication or whether it will require the plaintiff to seek its remedy in the courts of the State.

We, therefore, grant the defendants' motions, and will "retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted."

ORGANIZATIONS

NAACP—Georgia

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE et al. v. T. V. WILLIAMS, Revenue Commissioner.

Court of Appeals of Georgia, Division Nos. 1 and 2, December 5, 1958, 107 S.E.2d 243.

SUMMARY: The Georgia Revenue Commissioner made a demand on the NAACP and on certain of its officers and employees in Atlanta, Georgia, for the production of association records in order to determine whether it should be required to file state income tax returns. The demand being refused, some of the defendants were found to be in contempt. *Williams v. NAACP*, 2 Race Rel. L. Rep. 181 (Ga. Super. Ct. 1956). Superior Court Judge Pye refused to sign respondent Association's bill of exceptions necessary for appeal, and ordered certain statements deleted and others inserted. The Georgia Court of Appeals, in a mandamus proceeding, held that the judge's rulings were correct. *NAACP v. Pye*, 101 S.E.2d 609, 3 Race Rel. L. Rep. 312 (Ga. Ct. App. 1957). On appeal by writ of error, the Georgia Court of Appeals held that it lacked jurisdiction to review. *NAACP v. Williams*, 98 Ga. App. 74, 104 S.E.2d 923, 3 Race Rel. L. Rep. 980 (1958). The Georgia Supreme Court denied an appli-

cation for certiorari and a motion for reconsideration. On receipt of remittitur from the latter court, the Georgia Court of Appeals on the same day, acting under statutory requirement that it issue remittitur "immediately" to the trial court, transmitted the remittitur. Six days later, the NAACP moved the Court of Appeals to recall the remittitur from the trial court because the Association had had no opportunity after receipt of the remittitur by the Court of Appeals, to file a motion of intention to apply to the United States Supreme Court for certiorari. Although the mandatory language of the statute compelled immediate forwarding, the court said petitioner could have protected its rights by filing in advance with the Court of Appeals a request for stay of remittitur upon receipt from the state Supreme Court. Holding that jurisdiction of the case had been lost and that the remittitur could not be recalled, the court denied the motion. [Note: Petition to the United States Supreme Court for certiorari was subsequently filed, 27 L.W. 3262, 4 Race Rel. L. Rep. 253 (1959)].

PER CURIAM.

This case was decided by this court on July 23, 1958, and a rehearing denied on July 31, 1958, adversely to the contentions of the movants. An application for writ of certiorari was made to the Supreme Court of Georgia which was denied on October 15, 1958. A further motion for reconsideration by the Supreme Court was there denied on November 7, and on November 12, 1958, the remittitur from the Supreme Court was received by this court. The clerk of this court thereupon and in accordance with Code, § 24-3646 immediately transmitted the remittitur from this court to the trial court. Thereafter, on November 18, within six days from the time the remittitur was forwarded by this court to the trial court, a motion was filed on behalf of the National Association for the Advancement of Colored People et al. in this court in which it was alleged that it was the intention of movants to file a motion of intention to file an application for writ of certiorari to the Supreme Court of the United States as soon as the remittitur had been transmitted from the Supreme Court of Georgia to this court, and that because the remittitur had been transmitted by this court to the trial court on the same day that it was received from the Supreme Court of this State, without notice of such transmittal to movants, they had no opportunity to file their notice of intention to certiorari said case prior to the transmittal of the remittitur from this court to the trial court. Movants further allege that they did in fact file their notice of intention to certiorari the case to the Supreme Court of the United States within ten days from the date of the judgment of the Supreme Court of Georgia denying reconsideration in said case. The prayer is that this court recall its remittitur from the trial court.

[Code Language Mandatory]

Code, § 24-3646 states: "Where a judgment of this Court is affirmed by the Supreme Court, or where the writ of certiorari is denied, the remittitur of this Court shall issue immediately upon the filing of the remittitur from the Supreme Court. No entry upon the minutes shall be made." The language of this Code section makes it mandatory upon the clerk of this court to transmit the remittitur in such cases *immediately* upon its receipt from the Supreme Court. In such an event the language of Code, § 24-3644, which provides that on decisions of this court in the first instance the remittitur shall be held for 10 days (thus implementing the right granted in Code, § 24-3645 to file a notice of intention to certiorari to the Supreme Court of Georgia within 10 days) has no application. The right referred to in Code, §§ 24-3644 and 24-3645 was exercised by movants at the time they applied for the writ of certiorari to the Supreme Court of Georgia. The practice universally followed in this State by persons desiring to apply to the Supreme Court of the United States, and the only method whereby movants may be assured that this court will not return the remittitur to the trial court and thereby lose jurisdiction of the case, is for the movants to file in the office of the clerk of this court a request for stay of remittitur when it shall have been received by this court from the Supreme Court, and such request must necessarily be filed prior to the actual reception of the remittitur by the clerk of this court. This is the procedure followed in all such cases in this State, and, under the law, is the only effective means for the losing party to protect his rights.

In *Seaboard Air-Line Ry. v. Jones*, 119 Ga. 907 (9, 10), 47 S.E. 320, it was held: "After a judgment of the Supreme Court has been pro-

nounced and entered upon its minutes, and the remittitur issued and transmitted to the trial court and there received, the Supreme Court loses jurisdiction over the case, and can make no further order having the effect to alter or change the judgment pronounced * * * It follows from the foregoing that the Supreme Court can not recall its remittitur after the same has been filed in the office of the clerk of the trial court, where it has been regularly issued and

transmitted in accordance with the deliberate order and judgment of the Supreme Court."

It appearing that the remittitur in this case was regularly transmitted by this court to the trial court, this court has lost jurisdiction thereof and cannot recall the remittitur. Accordingly, the motion must be

Denied.

All the Judges concur.

PUBLIC ACCOMMODATIONS Restaurants—Delaware

William H. BURTON v. The WILMINGTON PARKING AUTHORITY, A body corporate and politic of the State of Delaware, and Eagle Coffee Shoppe, Inc., a corporation of the State of Delaware.

Court in Chancery, New Castle County, Delaware, April 15, 1959, 150 A.2d 179.

SUMMARY: A Delaware Negro citizen was refused service because of his race by a Wilmington restaurant, located in a leased space in a public parking building owned by the Wilmington Parking Authority, a state agency. He brought a class action in a state chancery court asking for a declaratory judgment that such discrimination violates the Fourteenth Amendment, and for injunctive relief. Although the lease contained a provision that the tenant "shall occupy and use the leased premises in accordance with all applicable law, statutes, ordinances and rules and regulations of any federal, state or municipal authority," defendant Authority disclaimed any control over the policy of its restaurant tenant, contending that the lease had been consummated as a strictly landlord-tenant business transaction. However, the court held that as the renting to the restaurant and other tenants constituted a "substantial and integral part of the means to finance a vital public facility," it was incumbent on the Authority to enter leases that would require the tenant to carry out the Authority's constitutional duty not to deny state citizens equal protection of the laws. The Fourteenth Amendment was held "applicable to the operation of all aspects of the structure here involved," and to forbid discrimination therein. Order was therefore issued granting to plaintiff and his class the relief requested.

MARVEL, Vice Chancellor.

Plaintiff, admittedly a person within the jurisdiction of the State of Delaware and a citizen, brings this class action for a declaratory judgment in the form of injunctive relief against the action of the defendant, Eagle Coffee Shoppe Inc., a purveyor of foodstuffs and beverages, in refusing to serve him at its restaurant. It is admitted that plaintiff was refused service at such restaurant solely because he is a Negro, and all parties have moved for

summary judgment on the basis that there is no material fact in dispute.

The Wilmington Parking Authority, which owns the space in which the Eagle Coffee Shoppe is located, is alleged to be an agency of the State and to have acquiesced in and consented to a discriminatory practice of the restaurant violative of the Fourteenth Amendment to the Constitution of the United States, and is therefore joined as a defendant to this class action.

[Authority Disclaims Control]

There is no doubt but that the Fourteenth Amendment forbids any state action which denies to any person within its jurisdiction the equal protection of the laws. However, the Parking Authority, while clearly a State agency, disclaims any control over the policies of its tenant, the restaurant. It contends that it has not purported to dictate to the restaurant as to how its business should be run, and that the lease granted the Eagle Coffee Shoppe is a strictly business transaction between landlord and tenant, consummated as a corollary to the creation of rental space in the parking facility in question for the express purpose of defraying in large part the financing and operation of such public facility.

Obviously, the Fourteenth Amendment plays no part in purely private acts of discrimination, its force coming into play when a state or one of its agencies or subdivisions fails to deal equally with any person within its jurisdiction.

[Public Ownership or Control]

In deciding whether or not discrimination violative of the Fourteenth Amendment has occurred, Courts make a determination as to whether or not the property involved in the action is in effect publicly owned, and if there is no clear showing of public ownership, whether or not state control is being exercised over a privately owned facility.

Thus, in *Eaton v. Board of Managers* (C.A. 4), 261 F.2d, the fact that a hospital established pursuant to public law was succeeded by a privately built hospital operated by its own board, thereby removing the hospital from the category of a publicly owned institution,¹ compelled a holding that Negro doctors did not have a constitutional right to insist that they not be barred from hospital staff status solely because of their race or color. Compare *Mitchell v. Boys Club* (D.C. Dist. of Columbia), 157 F.Supp. 101, and *Kerr v. Enoch Pratt Free Library* (C.A. 4), 149 F.2d 212.

On the other hand, when a Negro seeks rights in property owned by a state agency or by a state political sub-division, the device of a lease of such property to a concessionaire will not serve to insulate the public authority from the

1. The only public moneys currently received by the hospital were paid by the County for the care of indigent patients.

force and effect of the Fourteenth Amendment, *Lawrence v. Hancock* (D.C. S.D. W.Va.), 76 Supp. 1009, (a public swimming pool), and there would seem to be no valid basis for distinction when the leasing of space by a public authority is not a patent attempt at subterfuge but a good faith method of furnishing service to the public through a tenancy, *Derrington v. Plummer* (C.A. 5), 240 F.2d 922, cert. denied, 353 U.S. 924, (a restaurant in a county courthouse), and *Nash v. Air Terminal Services, Inc.*, (D.C. E.D. Va.), 85 F.Supp. 545 (a restaurant in a federally owned airport and so subject to the Fifth Amendment).

Conversely, where there are no public moneys or property involved, discrimination may be constitutionally forbidden because of the existence of governmental control over the operation of a privately owned institution or facility, *Commonwealth of Pennsylvania v. Board of City Trusts*, 350 U.S. 230.

[State Agency]

There is no doubt but that the Parking Authority is a tax exempt agency of the State engaged in furnishing public parking service in a facility, the financing of which is being borne in large part by rentals received from tenants occupying other parts of the building, *Wilmington Parking Authority v. Randolph* (Sup.Ct. Del.) 105 A.2d 614. Because these rentals constitute a substantial and integral part of the means devised to finance a vital public facility, in my opinion it was incumbent on the Authority to negotiate and enter leases such as the one here involved on terms which would require the tenant to carry out the Authority's constitutional duty not to deny to Delawareans the equal protection of the laws. To say that the Authority had no statutory power to operate the restaurant itself is to beg the question in view of the direct relation of rental income to the financing of the facility.

[Discrimination Forbidden]

The lease here provides that the tenant "... shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority," and despite the Authority's disclaimer of control over the policies and practices of the Eagle Coffee

Shophe, I am satisfied that the Fourteenth Amendment to the Constitution of the United States is applicable to the operation of all aspects of the structure here involved, and that it forbids discriminatory practices in the restaurant in which plaintiff seeks to establish class rights.

Plaintiff is entitled to a declaratory judgment to such effect. In view of this holding it is unnecessary to consider the common law pertaining to innkeepers or defendants' reliance on § 1501 of Title 24, Del.C. as a purported modification of such common law rule.

An appropriate order may be submitted denying defendants' motions and granting plaintiff's motion for a declaratory judgment as prayed for in the complaint.

ORDER

IT IS HEREBY ORDERED as follows:

1. That the Motions for Summary Judgment filed, respectively, by the defendant, The Wilmington Parking Authority, and the defendant, Eagle Coffee, Shoppe, Inc., are hereby denied.

2. That plaintiff's Motion for Summary Judgment is hereby granted.

3. That the policy, practice, rules, regulations and usage of the defendants, or either of them,

denying, by reason of color, race or ancestry, to the plaintiff or any other colored person or Negro, the right and privilege to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the restaurant operated by the defendant Eagle Coffee Shoppe, Inc., in the parking facility owned by defendant Wilmington Parking Authority and situate on the Southerly side of Ninth Street between Orange and Shipley Streets, in Wilmington, Delaware, are hereby declared in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. The defendants, their officers, agents, members and employees are hereby permanently enjoined from denying, by reason of color, race or ancestry, to the plaintiff or any other colored person or Negro the right to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the aforementioned restaurant.

5. That the court costs of this action be assessed against the defendant.

6. That the effect of this order be stayed pending the taking of an appeal by defendants upon the filing by them of a supersedeas bond in the amount of \$1,000.00 (one thousand dollars).

PUBLIC ACCOMMODATIONS Restaurants—New Jersey

Melvin S. EVANS and John R. Norwood v. Burt J. ROSS, Owner, trading as Holly House.

Camden County Court, Law Division, New Jersey, April 21, 1959, 150 A.2d 512.

SUMMARY: On complaint of an all-Negro group to the New Jersey Department of Education, Division Against Discrimination, a restaurant proprietor was found guilty of having discriminated against them because of race in refusing to reserve for their use one of his dining rooms. On appeal, the Camden County Court, Law Division, affirmed, holding that the Division Against Discrimination had jurisdiction over the type of violation alleged and that an act of discrimination had been committed. The court rejected defendant's contention that, whereas he maintained a public dining room on a nondiscriminatory basis, his other dining rooms, for which it is necessary to make a reservation and to which the public does not have access after such reservation is made, are private in nature; and therefore, denying the use of the latter rooms to complainants did not violate the statutory prohibition

concerning places of "public accommodation." Inasmuch as these rooms had been made available to various other organizations, the court held that adequate service on an equal basis must be afforded to a group of the colored race as well.

MARTIN, J.C.C.

This is an alleged discrimination case. It involves an experience of two representatives—the complainants here—of an all-Negro group organization functioning under the name of the Moorestown Civic Club who attempted to engage facilities of the appellant for the purpose of having a banquet for the members of that organization. The matter is here on appeal following a hearing before an Assistant Commissioner of Education who found the appellant guilty of acts of discrimination. N.J.S.A. 18:25-8(d); N.J.S.A. 18:25-21. On appeal the parties stipulated that the factual situation should be decided upon the transcript taken below. The appellant cannot seriously deny an act of discrimination as to this all-Negro group since the testimony indicates clearly his behavior, his conduct and his answers to their inquiries would logically lead to no other conclusion.

[Points on Appeal]

The appellant raises three points in urging a reversal:

1. The appellant's facilities were private in nature and did not fit the statutory category "place of public accommodation."

2. The statute does not provide for the Department of Education, Division against Discrimination, to have jurisdiction over this type of alleged violation.

3. The facts do not establish that the appellant was guilty of an act of discrimination towards these complainants or the group they represented.

It may be expeditious to dispose of these reasons for reversal in the inverse order of their presentation. As indicated earlier, a resumé of the testimony would indicate that the third ground for reversal is without any basis in fact. The testimony clearly indicates a negative desire on appellant's part to entertain the all-Negro group on his premises and that desire is manifested by a positive attitude against the availability of any part of his dinner facilities to this group for any date or occasion.

[Jurisdiction Questioned]

For the second reason advanced, namely jurisdictional right of the Department of Education, Division against Discrimination, to hear the complaint, the appellant urges that the Department of Education is given the right to hear these cases only because of the provisions of N.J.S.A. 18:25-6 which reads:

"There is created in the State Department of Education a division to be known as 'The Division Against Discrimination' with power to prevent and eliminate discrimination in employment against persons because of race, creed, color, national origin or ancestry or because of their liability for service in the armed forces of the United States, by employers, labor organizations, employment agencies or other persons and to take other actions against discrimination because of race, creed, color, national origin or ancestry or because of their liability for service in the armed forces of the United States, as herein provided; and the division created hereunder is given general jurisdiction and authority for such purposes."

[Scope of Jurisdiction]

He argues that this section limits the scope of that Department's jurisdiction to three types of complaints based upon discrimination: (1) discrimination in employment by employers, (2) discrimination in employment by labor organizations, (3) discrimination in employment by employment agencies or other persons. The appellant loses sight of the fact that since 1945 there have been at least four amendments to the original statute adopted by the Legislature in that year. Before the year 1949 there had been some doubt as to the legality of cease and desist orders through the Division against Discrimination under the prior statute but the Legislature—as a result of a report made on April 22, 1948, by a committee appointed by former Governor Alfred E. Driscoll known as the Committee on Civil Liberties—amended the discrimination statute under Title 18 of the introducer's statement to that bill carried the following legend:

"This Bill is intended to combine in one law the substantive provisions of the existing civil rights law, Revised Statutes, Sections 10:1-2 to 10:1-7 and the existing law against discrimination Revised Statutes, Sections 18:25-1 to 18:25-28. It consolidates and unifies procedure and places administration under an existing single administrative agency."

[1949 Amendment]

The amendment of 1949 (L.1949, c. 11, p. 37) provided that the Commissioner (Commissioner of Education) was to organize the Division (Division against Discrimination) into "two sections, one of which shall receive, investigate, and act upon complaints alleging * * * unlawful acts of discrimination against persons because of race, creed, color, national origin or ancestry." N.J.S.A. 18:25-8.

From N.J.S.A. 18:25-6, *supra*, the appellant charges that the latter portion of that statute states " * * * as herein provided; and the division created hereunder is given general jurisdiction and authority for such purposes" (emphasis added) means that the Legislature did not intend to incorporate those sections which follow and particularly N.J.S.A. 18:25-13 to 18:25-19, inclusive, under which this hearing was held. He urges that if that was the legislative intent, the word would have been "hereinafter" and not "herein." Chief Justice Weintraub in *New Capitol Bar & Grill Corporation v. Division of Employment Security*, Department of Labor and Industry, 25 N.J. 155, 160, 135 A.2d 465, (1957), held:

"It is frequently difficult for a draftsman of legislation to anticipate all situations and to measure his words against them. Hence cases inevitably arise in which a literal application of the language used would lead to results incompatible with the legislative design. It is the proper function, indeed the obligation, of the judiciary to give effect to the obvious purpose of the Legislature, and to that end words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms." *Alexander v. New Jersey Power & Light Co.*, 21 N.J. 373, 378, 122 A.2d 339, 342 (1956); *Wright v. Vogt*, 7 N.J. 1, 6, 80 A.2d 108 (1951); *Glick v.*

Trustees of Free Public Library, 2 N.J. 579, 584, 67 A.2d 463 (1949)."

The jurisdiction of the Commissioner of Education would, therefore, seem to have support in the present law.

[*Private vs. Public Accommodation*]

Although appellant has stressed three separate grounds to justify a reversal of the administrative ruling, it would appear that the principal ground urged is that the type of facilities he maintains is private rather than "a place of public accommodation."

In 1917 the Civil Rights Act was amended to include a comprehensive definition of a place of public accommodation, resort or amusement. L.1917, c. 106, p. 220. In 1921 it was again amended to include additional places of public accommodation. Under N.J.S.A. 18:25-1, with which statute we are concerned in these proceedings, no definition was given as to a place of public accommodation when our Legislature first adopted the law. It seemed to be directed mainly to discrimination in employment L.1945, c. 169, p. 589. However, in 1949 the act was amended and supplemented with a definition of a place of public accommodation which has been retained in every amendment thereafter. See latest amendment, L.1957, c. 66, p. 128, N.J.S.A. 18:25-5 (j).

The appellant contends that he maintains a public dining room to which room there was admittedly no discrimination shown. He argues that he also maintains various dining rooms not public in nature for which it is necessary to make a reservation, and after such reservation is made the general public does not have access thereto. He argues that these are private in nature and fit the exception of the definition which provides: "Nothing herein contained shall be construed to include or to apply to, any * * place of accommodation, which is in its nature distinctly private." (Emphasis added.) N.J.S.A. 18:25-5(j).

[*Used by Other Groups*]

The rooms which appellant designates as private in nature have in the past been assigned through prior reservations to parent-teacher association meetings, Boy Scout meetings, salesmen's meetings, post-funeral gatherings, dances, union meetings and fashion shows and even religious services by Jewish and Catholic or-

ganizations. It is not conceded nor meant to infer that any of these organizations consist of members who are totally of the colored race. The reservation for these rooms can include the service of food for consumption in the particular room engaged. The food is prepared and cooked in the same kitchen which serves the public dining room and served by personnel engaged by the appellant. While it is true that food in some instances is not served by the appellant and consumed by the persons engaging the particular room, nevertheless it is true that complainants in this instance, like many other organizations before them, sought the facilities for a banquet and were, at least impliedly, spurned.

The statutory definition of a place of public accommodation is most comprehensive, e. g., a place of accommodation shall include "• • • any restaurant, eating house, or place where food is sold for consumption on the premises • • • any auditorium, meeting place, or public hall • • •." Appellant's premises would certainly fit within either or both of these categories. The principal contention does not appear to be whether appellant's place of business is one of public accommodation but whether it comes within the exception as a "place of accommodation, which is in its nature distinctly private."

[Equality Required]

Appellant concedes his place of business is

available to all types of individuals, groups and organizations. Query: Is it appellant's reasoning that his facilities are available to all types of people or groups of people who make specific reservations for a specific room with or without food provided they are not of the colored race? This interpretation would render the law against discrimination in New Jersey futile and abortive. Adequate services must be available to all citizens regardless of race, color, creed or natural origin. The refusal of such equality of opportunity to any individual citizen or group of citizens by reason of race, color, creed or natural origin is discrimination. The New Jersey statute against discrimination is closely patterned after the New York law where its highest court through Judge Fuld aptly stated:

"One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by method subtle and elusive—for we deal with an area in which 'subtleties of conduct • • • play no small part.' • • • All of which amply justifies the legislature's grant of broad power to the commission to appraise, correlate and evaluate the facts uncovered." *Holland v. Edwards*, 307 N.Y. 38, 119 N.E. 2d 581, 584, 44 A.L.R.2d 1130 (1954).

The decision of the Commission is affirmed.

PUBLIC ACCOMMODATIONS

Swimming Pools—New York

In the Matter of the Application of NEW YORK STATE COMMISSION AGAINST DISCRIMINATION for an Order Pursuant to Section 298 of the Law Against Discrimination (Executive Law, Article 15—Against ACKLEY-MAYNES CO., INC., Lavern Rhinewald, President, d/b/a Mid-City Swimming Pool and Henry G. Finn, Manager.

IN THE MATTER OF THE PEOPLE OF THE STATE OF NEW YORK on the Relation of the NEW YORK STATE COMMISSION AGAINST DISCRIMINATION—against ACKLEY-MAYNES CO., Inc., d/b/a Mid-City Swimming Pool and Henry G. Finn, Manager.

New York Supreme Court, Albany County, Special Term, May 9, 1959, MOL 111-B.

SUMMARY: After a complaint had been filed with the New York State Commission Against Discrimination, (SCAD), charging owners of a swimming pool with discrimination against complainant because of her color, a hearing was held and respondents consented to an order of the Commission made on May 15, 1958. Respondents were ordered to take affirmative action to comply with the letter and spirit of the Law Against Discrimination by providing the

use of their pool on equal terms to all persons and to take six other specific steps looking to that end. Subsequently, non-compliance was charged and at a special term of the New York Supreme Court, Albany County, the SCAD on November 28, 1958, served on respondents an order of the court containing the same provisions as were in its own original order. Further non-compliance with two provisions was later charged by the SCAD in a contempt proceeding in the same court. The court found that although SCAD had diligently tried to induce compliance, respondents had largely ignored these efforts and had willfully and contumaciously disobeyed the court's order, wherefore they were found in contempt and ordered punished. The Commission's order of May 15, 1958, the court's order of November 28, 1958, and the court's memorandum decision and opinion of May 9, 1959, follow.

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE COMMISSION AGAINST DISCRIMINATION

ORDER

Upon the entire record in the above proceeding, it is hereby,

ORDERED: that the respondents, their agents, servants and employees, shall obey the provisions of the New York State Law Against Discrimination and admit all persons seeking admission to the Mid-City Swimming Pool at Menands, New York, individually and in groups, regardless of their race, creed, color or national origin, and

IT IS FURTHER ORDERED, that the respondents herein shall take the following affirmative action, which, in the judgment of the New York State Commission Against Discrimination will effectuate the purposes of the Law Against Discrimination:

1. Comply with the letter and spirit of the Law Against Discrimination, and provide the services and facilities of the Mid-City Swimming Pool on equal terms to all persons.

2. Advise and instruct their employees as to the provisions of the New York State Law Against Discrimination, indicating that they must comply with it or be disciplined. At the request of the State Commission Against Discrimination, distribute copies of the Commission's educational pamphlets to each employee.

3. Display the Commission Poster prominently in an easily accessible and well lighted place, where it may be seen and read by persons seeking admission to the Mid-City Swimming Pool.

4. Communicate with the Interracial Council of the Arbor Hill Community Center and advise the Council of the respondents' non-discriminatory policy relating to the services and facilities of and admission to the Mid-City Swimming Pool.

5. Write to the complainant, Barbara Ann Sharpe, care of her aunt, stating that if the complainant was discriminated against by the respondents because of her color, in gaining admission to the services and facilities of the Mid-City Swimming Pool, then the respondents apologize to the said Barbara Ann Sharpe and invite her to the use of the pool and its facilities during the summer of 1958, and thereafter.

6. Make available to the Commission and its representatives, whatever books, papers, records and information are, in the opinion of the Commission, deemed necessary to a review of the practices and policies of the respondents relating to the services and facilities of and admissions to the Mid-City Swimming Pool, for a period of time not beyond eighteen months from the date of this order.

7. Advise the Commission Against Discrimination within thirty days from the date of this order of their actions taken in compliance with the terms of this order.

ENTER

Dated: New York, New York
May 15, 1958

STATE COMMISSION
AGAINST DISCRIMINATION

Charles Abrams
Presiding Hearing Commissioner
Mary Louise Nice
Hearing Commissioner
John A. Davis
Hearing Commissioner

Court Order

ORDER: INDEX NO. 95663

MacAffer, Justice

The petitioner, New York State Commission Against Discrimination, having applied for an order enforcing, in whole, a certain order of the said Commission dated May 15, 1958, and said

application having duly and regularly come on to be heard,

NOW, upon reading and filing the petition of the New York State Commission Against Discrimination, made by Charles Abrams, Chairman thereof, duly verified the 25th day of November, 1958, and upon the transcript of the record in the proceeding before the New York State Commission Against Discrimination, consisting of the Notice of Hearing, dated March 24, 1958, the Verified Amended Complaint, dated March 24, 1958, the Verified Answer of the Respondent, Henry Finn, dated April 2, 1958 and the general appearance noted on the record of the respondents, Ackley-Maynes Company, Inc., LaVern Rhinewald, President, doing business as Mid-City Swimming Pool, this stipulation, and the order of the New York State Commission Against Discrimination, dated May 15, 1958, all duly certified to this Court by the Executive Secretary of the said Commission, by certification dated November 25, 1958, submitted in support of petitioner's application; and upon the express provision in the aforementioned stipulation of April 21, 1958, for the ex parte making and entering of an order of this Court enforcing, in whole, the said order of the Commission, and upon submission by Evelyn E. West, Esq., attorney for the petitioner, in support of said application and due deliberation having been had, it is on motion of Evelyn E. West, Esq., attorney for the petitioner,

ORDERED, ADJUDGED AND DECREED, that the petitioner's application to enforce, in whole, the order of the New York State Commission Against Discrimination, dated May 15, 1958, be, and the same hereby is, in all respects granted; and it is further

ORDERED, ADJUDGED AND DECREED, that Respondents their agents, successors and assigns shall forthwith:

1. Obey the provisions of the New York State Law Against Discrimination and admit all persons seeking admission to the Mid-City Swimming Pool at Menands, New York, individually and in groups, regardless of their race, creed, color or national origin, and

2. Take the following affirmative action, which, in the judgment of the New York State Commission Against Discrimination will effectuate the purposes of the Law Against Discrimination:

- (1) Comply the letter and spirit of the Law Against Discrimination, and provide the services

and facilities of the Mid-City Swimming Pool on equal terms to all persons.

- (2) Advise and instruct their employees as to the provisions of the New York State Law Against Discrimination, indicating that they must comply with it or be disciplined. At the request of the State Commission Against Discrimination, distribute copies of the Commission's educational pamphlets to each employee.

- (3) Display the Commission Poster prominently in an easily accessible and well lighted place, where it may be seen and read by persons seeking admission to the Mid-City Swimming Pool.

- (4) Communicate with the Interracial Council of the Arbor Hill Community Center and advise the Council of the respondent's non-discriminatory policy relating to the services and facilities of and admission to the Mid-City Swimming Pool.

- (5) Write to the complainant, Barbara Ann Sharpe, care of her aunt, stating that if the complainant was discriminated against by the respondents because of her color, in gaining admission to the services and facilities of the Mid-City Swimming Pool, then the respondents apologize to the said Barbara Ann Sharpe and invite her to the use of the pool and its facilities during the summer of 1958, and thereafter.

- (6) Make available to the Commission and its representatives, whatever books, papers, records and information are, in the opinion of the Commission, deemed necessary to a review of the practices and policies of the respondents relating to the services and facilities of and admissions to the Mid-City Swimming Pool, for a period of time not beyond eighteen months from the date of this order.

- (7) Advise the Commission Against Discrimination within thirty days from the date of this order of their actions taken in compliance with the terms of this order.

Memorandum

ENTER
ELSWORTH, J.

May 9, 1959

This is a proceeding to punish respondents Ackley-Maynes Co. and Henry G. Finn for contempt.

On March 24, 1958, Barbara Ann Sharpe filed with the State Commission against Discrimination a complaint in which she claimed she had

been discriminated against in the use of a swimming pool because of her color. A hearing took place on April 21, 1958 and at that time respondents consented to an order of the Commission subsequently made on May 15, 1958 in which it was provided that respondents should:

"(5) Write to the complainant, Barbara Ann Sharpe, care of her aunt, stating that if the complainant was discriminated against by the respondents because of her color, in gaining admission to the services and facilities of the Mid-City Swimming Pool, then the respondents apologize to the said Barbara Ann Sharpe and invite her to the use of the pool and its facilities during the summer of 1958, and thereafter.

(7) Advise the Commission Against Discrimination within thirty days from the date of this order of their actions taken in compliance with the terms of this order."

The Commission patiently but diligently tried to induce compliance by the respondents from the date of the order. Respondents evaded the issue of compliance by more or less ignoring the matter. On November 28, 1958, the Commission served an order of this court containing the same provisions as set forth in its own order. Respondents ignored the order of this court also and on March 17, 1959, the Commission instituted this proceeding.

The respondents' excuses for non-compliance with the order are weak and unpersuasive. The court finds that their disobedience was wilful and contumacious. The right of the People of the State of New York, as mandated to be enforced by the Commission, have been defeated, impaired, impeded and prejudiced.

Each of the respondents is found to be in contempt and each fined the sum of \$100. for contempt for violation of section 750(3) of the Judiciary Law and \$100. for contempt in violation of section 753(3) of the Judiciary Law, the said fines to be paid to the New York State Commission Against Discrimination within ten days of service of the order herein with notice of entry.

In addition respondent Henry G. Finn for his contempt is sentenced to a term of five days in the Albany County Jail but may purge himself from serving such jail sentence by complying with item "7" above set forth within ten days of the service of the order herein with notice of entry. Item "5" above set forth has been complied with since the institution of this proceeding. Commitment of said Finn is stayed for ten days after service of order upon him.

In the exercise of discretion no allowance of costs is made herein.

Submit order in accordance herewith.

TRANSPORTATION

Buses—Florida

Helen H. BULLOCK and Grover C. Bullock v. TAMiami TRAIL TOURS, Inc.

United States Court of Appeals, Fifth Circuit, April 20, 1959, 266 F.2d 326.

SUMMARY: A Negro minister and his apparently white wife, British subjects from Jamaica, unaccustomed to racial segregation and under the impression that it had been abolished in the United States, boarded a bus in Miami for New York, taking forward seats. Upon complaint from a fellow passenger, they were requested by the driver to move to the rear, but refused. At a subsequent stop in Perry, Florida, a local white person, after overhearing the second driver of the bus complaining about the situation, decided to buy a ticket to a nearby point. Inside the bus he assaulted the couple. In a federal district court suit by the couple against the company, judgment was entered for defendant, on the grounds that under Florida decisions a carrier is not liable to a passenger for an unprovoked and illegal attack by others, and that because no violence had occurred previously in Florida or adjoining states in four years of transportation integration defendants were not bound to have anticipated

the assault and taken steps to protect plaintiffs. 162 F.Supp. 203, 3 Race Rel. L. Rep. 743 (N.D. Fla. 1958). On appeal, the Court of Appeals for the Fifth Circuit held that the drivers, having been warned by company bulletins of possible racial disturbances, knowing plaintiffs' probable inexperience with southern traditions, and being aware of the novelty of having an apparently mixed couple seated together on a public carriage in this locality, should have realized the danger of this situation. Under such circumstances, it was held that the carrier was under a duty to protect obviously foreign Negro passengers by seeing that they were warned of southern segregation customs, by explaining reasons when requesting them to change seats, and by not calling attention to persons along the way to the unusual situation on the bus. The judgment was reversed with directions to award plaintiffs compensatory damages for physical injury and mental suffering and humiliation.

Before RIVES and TUTTLE, Circuit Judges, and SIMPSON, District Judge.

RIVES, Circuit Judge.

The appellants are Negroes, British subjects, natives of Jamaica, married to each other, and in their early fifties. For more than twenty years the husband has been a minister of the Church of England. The wife is a musician and teacher. Racial segregation is not practiced in the island of Jamaica.

Prior to 1956, the appellants had left that island on only one trip and that was to European countries and South American countries which did not segregate the races. They were not familiar with the racial segregation practiced in the Southern part of the United States.

In August 1956, they decided to make an extended visit to the United States, landing in Miami and going by bus first to Kansas City and then to New York. They made arrangements for the trip through the Mountain Travel Service before leaving Jamaica and bought tickets over the appellee's bus line. When the bus arrived in Perry, Florida, they were sitting together in the forward part of the bus usually occupied by white passengers. The husband was dark or black, while the wife, though a Negress, appeared to be a white woman.

[*Negro Couple Assaulted*]

At Perry, Florida, one Milton Poppell entered the bus and violently assaulted and beat the husband and slapped the wife. The circumstances are well described in the testimony of Poppell, quoted in the margin.¹ Other evi-

dentiary facts are stated in some detail in the opinion of the district court reported in 162 F.Supp. at pp. 203, et seq.

"A. Well, not exactly.

"Q. Where were you going on that trip?

"A. I have got a farm out this side of Perry.

"Q. About how far is it?

"A. Approximately ten miles, maybe twelve.

"Q. Mr. Poppell, how did you know that the Reverend Bullock was on that bus?

"A. Well, the police and I were sitting down there drinking coffee and I overheard the conversation of the bus driver telling the police that they were on there. He didn't say they were on there, he said, talking to them, 'fellows look what I have got to contend with and nothing I can do about it.' And the police says, 'our hands are tied too.'

"Q. He told that to the police officers?

"A. The best I remember that was the words said.

"Q. You heard—how far away were you?

"A. Well, I was sitting down there at the table.

"Q. At the table with the police officers?

"A. Yes, I was.

"Q. Then what did you say?

"A. I didn't say anything right then. In a few minutes I got up and asked if I could buy a ticket on the bus.

"Q. You asked the bus driver that?

"A. Yes.

"Q. Then what did he say?

"A. He said he had them for sale.

"Q. Mr. Poppell have you anything against colored people, generally?

"A. Not as long as they stay in their place.

"Q. Well, why did you assault him?

"A. Because he was out of his place.

"Q. How did you know he was out of his place? The bus wasn't full then, was it?

"A. Not at that time, it wasn't, but when everybody got on it was full. Whenever I got on it wasn't full.

"Q. How do you know it wasn't full?

"A. Well, there was plenty of loading space in the rear of the bus, but there wasn't any in the front.

"Q. Did anything the bus driver say lead you to believe he wasn't in his place?

"A. Well, I don't know whether you would figure it was what the bus driver said or what I felt that he was out of his place too.

"Q. Isn't it true that you wouldn't have known, Mr. Poppell, about the Bullocks being on the bus if it had not been for the bus driver?

1. "Q. Mr. Poppell did you go on a bus in Perry and assault this man right here?"

"A. Yes, I did.

"Q. Did you know he was on that bus before you went on there?"

"A. Well, yes, I did.

"Q. Is that the reason you went on the bus?"

After reaching New York, the appellants brought suit against the appellee in a New York State Court, claiming that the appellee had breached the duties owed to them as passengers by omitting to warn them of a foreseeable danger, by failing to protect them from that danger, and by willfully, or at least negligently,

"A. Well, I probably wouldn't have noticed it.

"Q. Then if you hadn't noticed it, you would not have gotten on the bus, isn't that right?

"A. Well, I couldn't say whether I would or wouldn't, because I just really don't know whether I would have gotten on there or not. My intention was not getting on there but then I decided to go.

"Q. At the time you heard the bus driver speaking you had no intention of getting on that bus, and you had your car didn't you?

"A. Yes, I did. I reckon I did. Yes, I did.

"Q. And when you heard the bus driver say something then you decided to get on the bus, isn't that right?

"A. Yes, that helped.

"Q. Mr. Poppell in your testimony in this court yesterday, you stated that you had nothing against colored people?

"A. That's right.

"Q. You added that if they kept their place?

"A. That's right.

"Q. Did you attack the Reverend Bullock simply from the fact he was seated on the bus?

"A. Well, yes. And I wanted to see and as a matter of fact he was with a white woman.

"Q. What do you mean, with a white woman?

"A. Well, his wife is supposed to be white, I understand.

"Q. How did you know who his wife was? Had you ever known the Bullocks before this?

"A. No.

"Q. How did you know who his wife was?

"A. Well, she was pointed out as she came in the bus station.

"Q. Was it the bus driver that pointed her out?

"A. I believe he made a remark to the policeman that that was his wife coming in.

"Q. How did you happen to hear this?

"A. Well, I was sitting with the policemen.

"Q. With the policemen?

"A. Yes, sir.

"Q. How far were you from the bus driver?

"A. Well, it is just like the table in the restaurant, I was sitting down at one end of it and one of the policemen was sitting on the opposite side and one on this side. And the bus driver walked up to the table.

"Q. And he spoke to the policemen?

"A. Yes.

"Q. And what did he say, Mr. Powell (sic), again?

"A. I believe he says, 'and that is his wife there.'

"Q. And he pointed out Mrs. Bullock?

"A. Yes.

"Q. And she appeared to you to be white at that time?

"A. Yes, she did.

"Q. Did he say anything about the man on the bus being married to a white woman?

"A. I don't remember.

"Q. Maybe this will refresh your recollection—did he say the man on the bus was married to a white woman?

aggravating the danger. The appellee, incorporated under the laws of Florida, being sued by citizens and subjects of Great Britain, had the case removed to the United States District Court for the Eastern District of New York.² That Court transferred the action to the United States District Court for the Northern District of Florida.³

There the case was tried to the court without a jury. After fairly finding the evidentiary facts in a manner to which the appellants take only minor exceptions, the district court entered judgment for the defendant, feeling that the law of the State of Florida required it to do so, and said in part:

"In *Hall v. Seaboard Air Line Ry. Co.*, 84 Fla. 9, 93 So. 151, the Florida Supreme Court held that a carrier was not liable to a passenger for an unprovoked and illegal assault in cases such as this case. Without regard to the views of this Court as to what

"A. I believe he did.

"Q. Did you hear it?

"A. Yes.

"Q. How far away were you from him?

"A. Well, he was standing at the head of the table and I was sitting down.

"Q. Now, of the two things, which do you think is the worse, in your opinion—

"A. Well, that's about fifty-fifty proposition.

"Q. You mean you don't like either one?

"A. Either one. Otherwise he was out of his place in my opinion in the front of the bus and he was certainly out of his place being married to a white woman.

"Q. Mr. Poppell when you went in there and asked him to move you didn't give him a chance to move?

"A. Well, I expected a fight back so I didn't give him too much a chance.

"Q. Why did you expect a fight back?

"A. I didn't figure he was going to give up his seat.

"Q. Why did you figure that he wouldn't give up the seat?

"A. Well, just a matter of my opinion.

"Q. Is it a practice that all colored people in Perry have to move back?

"A. Yes.

"Q. Why did you expect this to be any different?

"A. Well, I guess by him riding so far without any trouble.

"Q. Actually didn't you know that he had been asked to move?

"A. Yes, I did.

"Q. How did you find that out?

"A. I believe that the bus driver made the statement.

"Q. Now, is it your testimony that everything you knew about this man came from the bus driver or was there anyone else who told you anything about it?

"A. No, it wasn't discussed. The bus driver didn't tell me anything at all and it wasn't discussed with anybody else. All I knew was what I overheard."

2. Under 28 U.S.C.A. §§ 1441, 1332.

3. Under 28 U.S.C.A. §1404.

the law should be in such a case as this the decision of this Court is completely controlled by the decision of the Supreme Court of Florida in the case cited above.

"Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188."

Bullock v. Tamiami Trail Tours, N.D.Fla. 1958, 162 F.Supp. 203, 205.

[District Court Conclusions Rejected]

We are not in agreement with the district court either as to the Florida law or as to the ultimate facts, inferences or conclusions of duty and breach of duty on the part of the appellant carrier. In so far as those ultimate facts are simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, they are subject to review by this Court free from the restraining influence of the "clearly erroneous" rule, Rule 52 (a), Federal Rules of Civil Procedure; Galena Oaks Corporation v. Scofield, 5th Cir. 1954, 218 F.2d 217, 219. To the extent that the inference of negligence is controlled by Rule 52 (a), supra, this Court, on the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 1948, 333 U.S. 364, 395.

[Florida Decisions Reviewed]

In Hall v. Seaboard Air Line Ry. Co., 84 Fla. 9, 93 So. 151, the case relied upon by the district court as dispositive of the case at bar, a female passenger was assaulted by a male passenger in a Pullman berth, they being the only two occupants of the car. Holding that the plaintiff's proof failed to support her allegations that a porter and conductor heard her calls and bells in time to have prevented the assault, the court stated:

"The liability of the carrier in such case rests, not upon the tort of the passenger, but upon the negligent omission of the carrier through its servants to prevent the tort being committed. A failure to do anything which could have been done by the servant to prevent the injury renders the carrier liable. But to do something to prevent an injury resulting from an assault by a fellow passenger implies knowledge on the part of the servant that the act is contemplated by the stranger,

or by due diligence the servant could have obtained such knowledge, or had the opportunity to acquire it sufficiently long in advance of its infliction to have prevented it with the force at his command. 4 R.C.L. 1185.

"In guarding a passenger from a danger which is not usual or not incident to ordinary travel the carrier is held to the use of ordinary and reasonable care and diligence. It is the failure of the carrier through its agents to afford the required protection, after they had reasonable grounds for believing that violence or the insult was imminent, upon which the liability of the carrier rests. It is not the fact of injury to the passenger that fixes the carrier's liability. The injury must have been of such character and inflicted under such circumstances as that it might have been *reasonably anticipated or naturally expected to occur.*" (Italics supplied.) (93 So. at pp. 156-157.)

In Kenan v. Houston, 1952, 150 Fla. 357, 7 So.2d 837, 838, where, after alighting from the Florida East Coast train, plaintiff was struck on the legs by an ejection of steam from a nearby L&N train causing her to move about rapidly and fall over baggage, the court, in quashing a judgment against the Florida East Coast Railway, stated:

"... When it appears that the agency which caused the injury was other than defendant or its agents the plaintiff must prove that defendant knew or by the exercise of ordinary care could have known of it in time to remove the cause of the injury. 10 Am.Jur. 173, Chesapeake & O. Ry. Co. v. Burton, 4 Cir., 50 F.2d 730, 731.

"It is settled law that under the facts stated the Florida East Coast was bound to furnish Mrs. Houston reasonably safe facilities for leaving the train and to remain in the station but unless said company or its agents were in some way responsible or could have foreseen and prevented the accident, it cannot be held responsible for injury caused by the negligent act of a third person. In this case, the L. and N. Railway was the third person and we think was responsible for the accident. It was in no way attributable to the negligence of petitioner nor do we know of any criterion by

which it could have been put on notice of it. It had not happened before and the character of it was of such a nature that it could not have been *reasonably foreseen*." (Italics supplied.)

[Carrier Liability Rules]

Therefore, in *Hall v. Seaboard Air Line Ry. Co.* and *Kenan v. Houstoun*, supra, the rule may be generally stated that a carrier is liable for injury to its passenger caused by a fellow passenger or a third party if such injury by its nature could have been "reasonably anticipated" or "naturally expected to occur" or "reasonably foreseen" in time to have prevented the injury. If the injury could have been reasonably anticipated in time to have prevented its occurrence, the carrier is subjected to the highest degree of care to its passenger either to protect him from or to warn him of the danger.⁴

It was impossible for the driver to have protected the Bullocks from Poppell's assault after his intent became evident, but we think that the district court was clearly erroneous in holding that Tamiami could not have reasonably anticipated or foreseen the danger to the Bullocks in time to have at least warned them of its imminence. We can visualize no stronger case than this to show a situation where two bus drivers and the bus company officials should have reasonably anticipated that mischief was hovering about and that the Bullocks were in some danger.

The first driver testified that many people in West Florida would not approve of the Bullocks' being seated together toward the front of the bus. Driver Cunningham stated that there would have been less chance of trouble if the Bullocks had been sitting in the back. The first driver, after explaining to a complaining passenger that he could not move the Bullocks, heard another passenger say something like "they probably will move on down the line." Both drivers had actual notice of the two Company bulletins dated January 31, 1953, and January 23, 1956, the latter plainly warning the drivers of possible racial disturbances.⁵ Certainly, the first driver

and, no doubt, Cunningham knew the Bullocks were Jamaicans and British Nationals, and it is logical to infer that the drivers knew the Bullocks were not experienced with "southern tradition." All of the appellee's witnesses testified that this was the first instance they knew of in that part of the country where a Negro man and a seemingly white woman were seated together on a public carrier.

[Judicial Notice Taken]

Furthermore, this Court will take judicial notice (as the district court should have done) of the commonly and generally known fact that the folkways prevalent in Taylor County, Florida, the county seat being Perry, would cause a reasonable man, familiar with local customs, to anticipate that violence might result if a Negro man and a seemingly white woman should ride into the county seated together toward the front of an interurban bus.⁶

The next question is whether or not Tamiami, so charged with a duty of foreseeing danger to its passengers, took proper precautions to avoid such danger by the "utmost care and diligence of very cautious persons."⁷ We think that Tamiami failed to exercise this care in several ways. It should have instructed its agency in Jamaica to advise Negroes applying for passage through the southern part of the United States of the South's tradition of segregation. It should have instructed its driver to advise Negroes who were obviously foreigners, here known to be such, of segregation customs. The driver should have explained to the Bullocks his reasons for wanting them to move. Above all, the driver should not, either willfully or negligently, have informed the assailant of

PASSENGER REFUSES A SEATING OR RESEATING REQUEST. SHOULD ANY DISTURBANCE ARISE, POLICE AUTHORITIES MAY BE SUMMONED TO QUELL SUCH DISTURBANCE.

6. In *United States ex rel. Goldsby v. Harpole*, 5th Cir. 1959, 263 F.2d 71, this Court said:

"... The Supreme Court of Mississippi has said that, 'We have the right to make use of knowledge of the popular and general customs of the people of this State, and public conditions therein.' *Moore v. Grillis*, 1949, 205 Miss. 865, 39 So.2d 505, 508, 10 A. L. R.2d 1425. A like authority and duty is vested in this Court." Citing, *City of Hughes Springs, Tex. v. Lips*, 5 Cir., 1941, 118 F.2d 238; *Rogers v. Douglas Tobacco Board of Trade*, 5 Cir., 1957, 244 F.2d 471, 478; *Mays v. Burgess*, 1945, 79 U.S.App. D.C. 343, 147 F.2d 869, 873, 162 A.L.R. 168; 20 Am.Jur., Evidence, Sec. 108.

7. *Pelot v. Atlantic Coast Line R. Co.*, Fla. 1911, 53 So. 937, 938.

4. See, 10 Am. Jur., *Carriers*, §§ 1453-1470; 13 C.J.S., *Carriers*, §§ 695, 696; Annotations, 15 A.L.R. 868, 42 A.L.R. 168, 43 A.L.R. 1035; A.L.I., *Restatement of Torts*, § 348. The duty to warn is identical to the duty to protect. See *Rose v. City of Chicago*, Ill.App., 45 N.E. 2d 717.

5. "UNDER NO CIRCUMSTANCES SHALL POLICE AUTHORITIES BE SUMMONED IF A

the Bullocks' position on the bus and of their apparent color and lack of color.

The district court found, at least impliedly, that Tamiami was not guilty of any willful or aggravated misconduct justifying the imposition of punitive damages, and to that extent its finding is not clearly erroneous. Upon the present record, however, we conclude that the danger should reasonably have been foreseen by Tamiami in time to act with the utmost care to avoid injury to its passengers, particularly by warning them and by not doing foolish things to increase their danger, and that Tamiami

breached the duty owed to its passengers, the appellants. The judgment is therefore reversed and the cause remanded with directions⁸ to enter judgment for each of the plaintiffs, appellants, and upon the evidence contained in this record, to award each of them reasonable compensatory damages, including damages for physical injury and mental suffering and humiliation.⁹

Reversed and remanded with directions.

8. See 28 U.S.C.A. §2106.

9. See *Atlantic Greyhound Lines v. Lovett*, Fla. 1938, 184 So. 133, 140.

TRIAL PROCEDURE

Grand Juries—North Carolina

STATE v. A. E. PERRY.

Supreme Court of North Carolina, April 29, 1959, 108 S.E.2d 447.

SUMMARY: The defendant, a Negro doctor, indicted by a Union County, North Carolina, grand jury for using drugs and instruments with intent to procure a miscarriage, was tried and convicted, despite his claim that he was denied due process of law and the equal protection of the laws as guaranteed by the federal and state constitutions because of systematic exclusion of Negroes from the grand jury. On appeal, the Supreme Court of North Carolina reversed and remanded the case, finding that "... the trial court denied defendant a reasonable opportunity and time to investigate and produce evidence" of unlawful exclusion of Negroes from juries. 248 N. C. 334, 103 S.E.2d 449, 3 Race Rel. L. Rep. 755 (1958). On remand, defendant again moved to quash upon the same grounds as before. After a hearing, the court denied the motion, finding as fact that, although Negroes constitute 12½% of the adult population of Union County and no Negroes had served on the county's grand jury in 1957, Negroes had served on the grand jury "at various times before and subsequent to 1957" and on the court's trial panel before, during and after 1957; that there was no evidence that any qualified person had been wrongfully excluded from jury service at any time; and that there was no systematic exclusion of qualified persons from the 1957 grand jury. Defendant again appealed to the North Carolina Supreme Court, assigning these findings as error. The Supreme Court pointed out that defendant had offered no evidence of racial discrimination at any time in jury selection procedure in Union County and concluded that the findings of fact below were substantially accurate, and that defendant's motion to quash was properly denied.

PARKER, Justice.

This action was here on a former appeal by the defendant. *State v. Perry*, 248 N.C. 334, 103 S.E.2d 404. An examination of the case on the former appeal and of the instant case shows that the bill of indictment in this case is the same bill of indictment that was before this Court on the former appeal of this case.

[History of Case]

This appears from our decision of the former appeal: The defendant is a Negro doctor. Lillie Mae Rape is a white woman. The bill of indictment, which charges that the offense was committed in Union County on 4 October 1957, was found on 28 October 1957 by the grand jury of Union County at the October 1957, Mixed Term

Union County Superior Court, which convened on the day the indictment was found. The defendant on 28 October 1957, in apt time, before pleading to the bill of indictment, (*State v. Linney*, 212 N.C. 739, 194 S.E. 470; *State v. Speller*, 229 N.C. 67, 47 S.E.2d 537), filed a written motion to quash the bill of indictment, for the reason that Negroes because of their race have been systematically excluded from serving upon grand juries of Union County for a long period of time, and that Negroes because of their race were excluded from serving upon the grand jury of Union County at the term of court when the bill of indictment was found, and that such systematic exclusion of members of the defendant's race from the grand juries of Union County is a violation of his rights guaranteed to him by the due process and equal protection clauses of the Federal Constitution Amend. 14, and by Art. I, Sec. 17, of the State Constitution. On the day the bill of indictment was found, the trial court ordered a special venire of 50 persons from Anson County to appear in court on 30 October 1957, from which a trial jury was to be selected in the case. On 30 October 1957, the State announced it was ready to proceed with the trial. Whereupon, counsel for the defendant requested that they be given time and opportunity to inquire into the alleged systematic exclusion of Negroes from grand jury services in Union County, and in support of their request and motion to quash the bill of indictment filed an affidavit by one of defendant's counsel. The material parts of said affidavit are summarized in our opinion on the former appeal, and need not be repeated here. The trial court then found as a fact that the defendant had offered no evidence on his motion to quash the bill of indictment, except this affidavit, and denied the motion. To such denial the defendant excepted. The defendant then pleaded Not Guilty. He was convicted by the jury, and sentenced to a term of imprisonment by the court. From such sentence he appealed to the Supreme Court.

[Judgment Reversed]

The Court on the former appeal reversed the verdict and judgment of imprisonment, and closed its opinion with this language:

"Whether a defendant has been given by the court a reasonable time and opportunity to investigate and produce evidence, if he

can, of racial discrimination in the drawing and selection of a grand jury panel must be determined from the facts in each particular case. After a careful examination of all the facts in the instant case, it is our opinion that the trial court denied the defendant a reasonable opportunity and time to investigate and produce evidence, if such exists, in respect to the allegations of racial discrimination and to the grand jury set forth in motion to quash and in the supporting affidavit of Samuel S. Mitchell. Whether the defendant can establish the alleged racial discrimination or not, due process of law demands that he have his day in court on this matter, and such day he does not have, unless he has a reasonable opportunity and time to investigate and produce his evidence, if he has any.

"The judgment and verdict below are reversed, and the case is remanded for further proceedings. In the Superior Court the defendant will have the opportunity to present the evidence, if any, that he may have as to the alleged racial discrimination in the grand jury panel. If the trial court at such hearing then finds there was no racial discrimination, the trial will proceed on the present indictment. If the trial judge then finds there was racial discrimination in the grand jury panel, and quashes the indictment, the defendant is not to be discharged. He will be held until an indictment against him can be found by an unexceptionable grand jury. *State v. Speller* [229 N.C. 67, 47 S.E.2d 537]." [103 S.E.2d 407.]

[Case Removed]

Our opinion on the former appeal was filed 7 May 1958. At the 25 August Term 1958 of the Superior Court of Union County, the defendant, pursuant to N.C.G.S. § 1-84, made a motion for removal of this case for trial to some adjacent county, and supported the motion by an affidavit suggesting that there are probable grounds to believe that a fair and impartial trial of the case cannot be had in Union County. Judge Olive presiding granted the motion, and entered an order decreeing that the case be removed to the Superior Court of Stanly County for trial at the 24 November 1958 Term, or at a later term.

[Motion to Quash]

At the 24 November Term 1958 of Stanly Superior Court, the defendant, again in apt time, before pleading to the bill of indictment, moved to quash the bill of indictment on the identical grounds that he did at his former trial at the October 1957, Mixed Term of Union County, as above stated. In his motion to quash the defendant requested that the trial court issue subpoenas and subpoenas *duces tecum* requiring the presence in court of the Clerk of the Superior Court of Union County, the County Commissioners of Union County, the Sheriff of Union County, the Tax Collector of Union County, and the County Accountant of Union County as witnesses to be examined by him in respect to his contention that members of the Negro race were purposely excluded by reason of their race from the grand jury of Union County which indicted him, and that such officials bring with them "certain records, documents and papers pertaining to Union County Grand Jury Compositions since 1936 through the present year."

When the motion to quash the bill of indictment came on to be heard, the defendant placed on the stand and examined J. Hampton Price, Clerk of the Superior Court of Union County; B. F. Niven, the Tax Collector of Union County; Roy J. Moore, Tax Accountant and Tax Supervisor of Union County, and also Clerk to the Board of County Commissioners of Union County; James R. Braswell, Chairman of the Board of County Commissioners of Union County; and Shelly Griffin, a Deputy Sheriff of Union County for eight years, and in charge of the courtroom when court is in session. Ben Wolfe, Sheriff of Union County, did not appear, but sent a statement by a reputable physician to the effect that he is receiving treatment for severe high blood pressure, has frequent black-out attacks, and has been advised by his physician not to appear in court for any reason because of his health. The Record shows that these witnesses brought with them many and voluminous records, documents and papers pertaining to the composition of Union County Grand Juries for many years and up to the time of the hearing of defendant's motion to quash the bill of indictment. Defendant offered no other witnesses than those named above.

[Fact Findings Below]

Judge Olive having heard all the evidence

and arguments of counsel made the following findings of facts:

"1. That the said Grand Jury at the October 1957 Term of Union County Superior Court was regularly drawn and constituted as provided by the North Carolina Statute and there was no systematic, purposeful, intentional or arbitrary exclusion of any qualified person from said jury by reason of race, or otherwise.

"2. That adult negroes constitute approximately 12% of the total adult population of Union County, North Carolina.

"3. That, although there was no member of the colored race on the Grand Jury of Union County in 1957 (the Grand Jury of said County was chosen for a period of one year as provided by law), members of the colored race served on the Grand Jury at various times before and subsequent to 1957; and members of the colored race have served on the trial panel of said court regularly before, including and subsequent to 1957.

"4. That no evidence was offered by movant that any qualified person to serve as a juror was wrongfully excluded from serving on the Grand and Petit juries of Union County at any time.

"5. That the Bill of Indictment in this case was regularly and legally found and returned by a duly and legally constituted Grand Jury of Union County, North Carolina, at the October 1957 Term of Superior Court of said County.

"6. That none of the movant's constitutional rights were violated or abridged in the selection of the Grand Jury which found and returned the Bill of Indictment in this case."

Whereupon Judge Olive denied the motion to quash the bill of indictment.

[Error Assigned]

Defendant assigns as errors Judge Olive's findings of fact Numbers 1, 3, 4, 5 and 6, for the reason that these findings of fact are contrary to the evidence offered by the defendant, and to all the competent evidence offered during the hearing of the motion to quash the bill of indictment. Defendant neither excepts to, nor assigns as error, the finding of fact Number 2 "that adult

negroes constitute approximately 12% of the total adult population of Union County, North Carolina."

The findings of fact of Judge Olive are conclusive on appeal, if supported by competent evidence, "in the absence of some pronounced ill consideration" of the evidence by Judge Olive. *State v. Koritz*, 227 N.C. 552, 43 S.E.2d 77, 80, certiorari denied 332 U.S. 768, 68 S.Ct. 80, 92 L.Ed. 354; *State v. Speller*, 231 N.C. 549, 57 S.E.2d 759, certiorari denied 340 U.S. 835, 71 S.Ct. 18, 95 L.Ed. 613; *State v. Kirksey*, 227 N.C. 445, 42 S.E.2d 613; *State v. Bell*, 212 N.C. 20, 192 S.E. 852; *State v. Walls*, 211 N.C. 487, 191 S.E. 232; *State v. Cooper*, 205 N.C. 657, 172 S.E. 199; *Akins v. State of Texas*, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692; *Thomas v. State of Texas*, 212 U.S. 278, 29 S.Ct. 393, 53 L.Ed. 512.

[Statutory Provisions Re Juries]

Prior to 1947, it was provided by N.C.G.S. § 9-1 that the tax returns of the preceding year for the county should constitute the source from which the jury list should be drawn, and this was then the only prescribed source, and from this source shall be selected for the jury list the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence. To meet the constitutional change of the previous year election, N.C.Const. Art. I, Sec. 13, making women eligible to serve on juries, N.C.G.S. § 9-1 was amended in 1947, 1947 Session Laws, Ch. 1007, enlarging the source to include not only the tax returns of the preceding year but also "a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age," to be prepared in each county by the Clerk of the Board of Commissioners. The 1947 amendment struck out the provision as to the payment of taxes for the preceding year, and further provided that names of the jury list shall be secured from such sources of information as are deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. Excluded from the list are persons who have been convicted of crime involving moral turpitude, or are *non compos mentis*.

N.C.G.S. § 9-2 provides that the jury list shall be copied on small scrolls of paper of equal size

and put into the jury box. N.C.G.S. § 9-3 provides that at least twenty days before a term of the Superior Court, the Board of County Commissioners shall cause to be drawn from the jury box by a child not more than ten years of age the required number of scrolls and the persons who are inscribed on such scrolls shall serve as jurors at the term of the Superior Court next ensuing such drawing.

N.C.G.S. § 9-24 provides that a Judge of the Superior Court presiding over a term of court at which a grand jury is to be selected "shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court." N.C.G.S. § 9-25, Grand Juries in Certain Counties, provides as to Union County as follows: "A grand jury for Union County shall be selected at each February term of the superior court in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of their selection."

The grand jury which indicted the defendant at the October 1957, Mixed Term of the Union County Superior Court, was selected, sworn and impaneled at the February Term 1957 of Union County Superior Court, pursuant to N.C.G.S. § 9-25, which appears in the Record of this case on the former appeal.

[Court Clerk's Testimony]

J. Hampton Price, Clerk of the Superior Court of Union County for 9 years, and prior to that County Tax Collector of Union County for about 13 years, testified in substance as follows: I have the jury book with me covering the period from 1945 up to the present. I think the Minutes of the Court took care of the jury up until that time. I have the Minutes Docket Book of the Court back to 1936. I am familiar with most of the names on the jury list since I have been Clerk. Ike Montgomery, a Negro, was on the grand jury in 1954. Lex Houston, a Negro, is on the grand jury in 1958. There were other Negroes in the panels, but when you are drawing them by lot it is not always possible to get a Negro on the grand jury, due to the small ratio between Negroes and whites in Union County. From 1950 to 1958, both inclusive, no Negroes

served on the grand juries of Union County, except Ike Montgomery and Lex Houston. In 1942 there is the name of Curtis Smith, and I think we have a Curtis Smith, white and a Curtis Smith, Negro. In 1945 there is one W. I. Helms, and I don't know if he is a Negro or white. In 1948 there is a Hoyle Helms, and I don't know if he is a Negro or white. In 1939 there is a Curtis Helms, and I don't know if he is a Negro or white.

[Tax Collector's Testimony]

B. F. Niven, County Tax Collector of Union County for 8 years, and prior to that Deputy Sheriff of the county for 4 years, and Sheriff of the county for 16 years, testified in substance as follows: He has with him his records and ledgers for about 21 or 22 years. From his records he testified as to the numbers of whites and the numbers of Negroes in the 9 townships of Union County for a number of different years. He didn't miss a court during the 20 years he was Deputy Sheriff and Sheriff. He did not attend court after he was Sheriff. He testified as follows: "I cannot say that any negroes were on the Grand Jury during my term. They were on the regular panel but the Grand Jury is selected out of the regular panel in the courtroom in the presence of the Court by a child out of a hat. The whole panel is in there. I think if a negro had been chosen to serve on the Grand Jury I would have known it. I could not say for sure that any negroes did not serve on the Grand Jury, but I do know that they have been on the regular juries and there could have been one on the Grand Jury, but I could not name one by name. I know Ike Montgomery. I am not sure which township he lives in but I think it is Vance. I have my scroll for the year 1954."

[Tax Supervisor's Testimony]

Roy J. Moore, Tax Accountant and Tax Supervisor of Union County since 15 May 1935, testified in substance: He is Clerk to the Board of County Commissioners of Union County. He helps prepare the jury list. The jury list is prepared every two years from the tax scroll for men, both Negroes and whites. He gets the names of women, both Negroes and whites, from the precinct lists. About 10% of the names placed in the jury box are women. When the jury list is prepared, it is presented to the Board of County Commissioners. The names so presented

are cut from this list, and put in the jury box. From the jury list presented to the Board of County Commissioners is excluded those people exempt from jury service by N.C.G.S. § 9-19, to wit, all practicing physicians, regular ministers of the gospel, practicing attorneys at law, etc. No Negroes have been excluded from grand juries because of race to his knowledge.

An affidavit of Roy J. Moore in the Record shows that 48 persons were drawn from the jury box for service as jurors at the February Term 1957 of the Union County Superior Court, and that of this number one person at least was a Negro.

[County Commissioners Board Chairman]

James R. Braswell, Chairman of the Board of County Commissioners of Union County for the past four years testified in substance: The jury list has been prepared and put in the jury box twice since he was chairman—in 1955 and 1957. The jury list is made up from the tax records and precinct scrolls. He has been present each time the jury was drawn from the jury box during his term of office. At no time during his chairmanship of the Board has there been any discrimination.

This appears from an affidavit of James R. Braswell in the Record: "Affiant further says that in selecting the names of male persons for jury service, in the manner above stated, no consideration or regard is given to race, creed or color; that all names of women are selected from the precinct registration books for jury service without regard to race, creed, color or party affiliation; that the names of the white race and the Negro race selected from the tax returns are therefore in direct proportion to the names of persons of the white race and the Negro race appearing on the tax returns and the precinct registration books."

[Sheriff's Testimony]

Deputy Sheriff Shelly Griffin, Deputy Sheriff for 8 years, a Policeman for 6 years, and just elected Sheriff of Union County, testified, in part, on direct examination by defendant's counsel: "I have been Deputy Sheriff for eight years. When court is in session, I take charge of the courtroom. The Sheriff is there most of the time and I am there most of the time also. During the period, I knew personally that Lex Houston served on the Grand Jury and I believe

that he served this year. He is serving now. He began to serve in February, 1958. I cannot remember any others who served; there may have been one more, but I can't remember." On cross-examination by the State he testified: "During my eight years of public service there, I have observed the trial panel and have observed negroes serving on the trial juries. About every term of Court we have, from one to two, maybe more. And that has been true within the past eight years. I have just been elected Sheriff of the County." On redirect examination by defendant's counsel he testified: "During my eight years I have observed negroes on the jury panel, one or two on practically every jury panel. Prior to that time, I was a City Police Officer and I did not get too much chance to go into the courtroom. But during those eight years, I can only remember seeing two negroes on the Grand Jury."

Defendant introduced in evidence the grand jury lists of Union County Superior Court for the years 1936 through 1958.

[Evidence not Offered]

Defendant has offered no evidence that any qualified Negro, man or woman, has had his or her name excluded at any time from the jury list or the jury box of Union County, or has been excluded at any time from serving on grand and petit juries in Union County Superior Court, by reason of race.

Defendant has offered no evidence of any racial discrimination at any time against members of the Negro race in the preparation of the jury list and the jury box in Union County, and in drawing jurors from the jury box for a term of court. Defendant has offered no evidence of any racial discrimination at any time against members of the Negro race in the drawing in open court by a child under ten years of age of the names of eighteen jurors to serve as a grand jury from the names of all persons returned as jurors at that term from a box or hat containing the names of all the jury panel, as is required by N.C.G.S. § 9-24.

According to Judge Olive's finding of fact Number 2, to which defendant has not excepted, adult Negroes constitute about 12½% of the adult population of Union County. The defendant's evidence clearly shows that for at least eight years prior to November 1958 one or two Negroes have served on practically every jury

panel at terms of Union County Superior Court, and from these panels during that time the grand juries of Union County Superior Court have been selected. The evidence is undisputed that the names of jurors drawn from the jury box to serve as jurors at the February Term 1957 Union County Superior Court contained at least the name of one Negro, and that from this list of jurors the grand jury was drawn that found the bill of indictment in this case. Defendant's evidence also plainly shows that for at least eight years prior to November 1958, only two Negroes, to wit, Ike Montgomery in 1954, and Lex Houston in 1958, have served upon the grand juries of Union County Superior Court. Considering all of the evidence, the facts that for at least eight years prior to November 1958 only two Negroes were drawn from a box or hat in open court by a child under ten years of age, as grand jurors from a list of jurors, practically all of which contained the names of one or two Negroes, and that the grand jury finding the bill of indictment in this case was drawn from a jury panel containing at least one Negro, do not show, in our opinion, that Negroes because of their race have been systematically excluded from serving upon grand juries of Union County for at least eight years prior to November 1958, and in particular fails to show that Negroes because of their race were wrongfully excluded from serving on the grand jury that found the bill of indictment against defendant in this case.

This Court said in *State v. Walls*, supra [211 N.C. 487, 191 S.E. 237]: "The child draws from the jury box the names of all sorts and conditions of men, white and negro persons, Jew and Gentile, who are qualified to serve under the law. A more perfect system could hardly be devised to insure impartiality."

[Fact Findings Amended]

Judge Olive's findings of fact are amply supported by competent legal evidence, with this exception: Judge Olive found in his findings of fact Number 3 that "members of the colored race served on the grand jury at various times before and subsequent to 1957." The evidence plainly shows, and he should have found, that two Negroes have served on Union County grand juries for at least eight years prior to November 1958, to wit, Ike Montgomery in 1954, and Lex Houston in 1958. We amend his findings of fact in that respect alone. Before 1950

the evidence is not sufficiently clear to justify a finding of fact that Negroes have served upon the grand juries of Union County from 1936 to 1950. A study of the evidence plainly shows that this is not a case where Judge Olive's crucial findings of fact are so lacking in support in the evidence that to give them effect would work that fundamental unfairness which is at war with due process or equal protection. Defendant's assignments of error to Judge Olive's findings of fact, as amended by us, are overruled.

Defendant's assignments of error to Judge Olive's failure to find that Negroes have been systematically excluded from serving on grand juries of Union County for more than twenty years, and including the grand jury impaneled in 1957, and from the grand jury that indicated defendant, are overruled.

Defendant assigns as error the denial of his motion to quash the bill of indictment.

[Burden of Objector]

A Negro objecting to a grand or petit jury because of alleged discrimination against Negroes in its selection must affirmatively prove that qualified Negroes were intentionally excluded from the jury because of their race or color. *State v. Perry*, supra; *Miller v. State*, 237 N.C. 29, 74 S.E.2d 513, certiorari denied 345 U.S. 930, 73 S.Ct. 792, 97 L.Ed. 1360; *Fay v. People of State of New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043; *Akins v. State of Texas*, supra.

This Court speaking by Ervin, J., said in *Miller v. State*, supra [237 N.C. 29, 74 S.E.2d 525]: "The Fourteenth Amendment to the Constitution of the United States does not confer upon a Negro citizen charged with crime in a state court the right to demand that the grand or petit jury, which considers his case, shall be composed, either in whole or in part, of citizens of his own race. All he can demand is that he be indicted or tried by a jury from which Negroes have not been intentionally excluded because of their race or color. In consequence, there is no constitutional warrant for the proposition that a jury which indicts or tries a Negro must be composed of persons of each race in proportion to their respective numbers as citizens of the political unit from which the jury is summoned. [Citing numerous cases from the U. S. Supreme Court and from our Court]."

[Eubanks Case Distinguished]

Eubanks v. State of Louisiana, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991, is plainly distinguishable. The procedure in the State of Louisiana in selecting grand jurors is entirely different from the procedure in North Carolina. The facts of the two cases also differ.

The Supreme Court of the United States has held consistently for 80 years that the indictment of a Negro defendant by a grand jury in a state court from which members of his race have been systematically excluded solely because of their race is a denial of his right to the equal protection of the laws required by the Fourteenth Amendment to the United States Constitution. *State v. Perry*, supra; *Miller v. State*, supra; *Eubanks v. State of Louisiana*, supra. A like conclusion is reached in North Carolina by virtue of our decision on "the law of the land" clause embodied in the Declaration of Rights, Art. I, Sec. 17, of the North Carolina Constitution, and we have consistently so held since 1902. *State v. Peoples*, 131 N.C. 784, 42 S.E. 814; *State v. Speller*, 229 N.C. 67, 47 S.E.2d 537; *Miller v. State*, supra; *State v. Perry*, supra. However, the evidence in this case and Judge Olive's findings of fact do not show a systematic exclusion of members of the defendant's race, solely because of their race, from the grand jury which found the bill of indictment against him, and from grand juries of Union County for at least seven years before that time.

[Error Assignments Overruled]

Judge Olive designates all of his findings as findings of fact. They are both findings of fact and conclusions of law. His findings of fact, as amended by us, amply support his conclusions of law and his order. Judge Olive properly denied defendant's motion to quash the bill of indictment, and his assignment of error thereto is overruled.

Defendant's assignment of error for the failure of the court to strike out an affidavit of James R. Braswell, Chairman of the Board of County Commissioners, offered in evidence by the State is overruled. The learned trial judge was well able to weigh the evidence, and to disregard incompetent evidence, if any, in the affidavit. There is nothing in Judge Olive's findings of fact to show, that if the affidavit contained incompetent evidence, which we do not admit,

it influenced in any way his findings of fact, his conclusions of law, and his order refusing the motion to quash the bill of indictment. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E.2d 668; *State Farm Mutual Automobile Insurance Co. v. Shaffer*, 250 N.C.—, 108 S.E.2d 49.

Defendant has in his brief his exceptions to the failure of the trial court to sustain his motions for judgment of nonsuit. He makes no argument in his brief in respect thereto. He closes his brief by stating that if his assignment of error to the refusal of the court to quash the bill of indictment is overruled, that he should be awarded a new trial. There was sufficient evidence offered by the State to carry the case to the jury. The trial court correctly overruled defendant's motions for judgment of nonsuit.

Defendant's only other assignments of error, brought forward and discussed in his brief, relate to a hypothetical question asked Dr. J. G. Faulk. Dr. Faulk is a physician and surgeon. Defendant admitted he is a medical expert specializing in surgery. In October 1957 Dr. Faulk was chief of surgery in Union Memorial Hospital. On 12 October 1957 he saw Lillie Mae Rape in the hospital. He took her to an examination room, and did a pelvic examination. The hypothetical question contained a full and fair recital of all relevant and material facts already in evidence, and it was sufficiently explicit for the witness to give an intelligent and safe opinion. It was properly framed so as to inquire of Dr. Faulk, if he had a professional opinion, whether Lillie Mae Rape had had a miscarriage, and if so, what was the cause of it. Dr. Faulk drew no inference from the testimony. He merely expressed his professional

opinion upon an assumed state of facts supported by evidence previously offered. Dr. Faulk's answers to the hypothetical question related to matters requiring expert knowledge in the medical field about which a person of ordinary experience would not be capable of forming a satisfactory conclusion unaided by expert testimony from one learned in the medical profession. All defendant's assignments of error relating to the hypothetical question and the answers thereto are overruled. *State v. Knight*, 247 N.C. 754, 102 S.E.2d 259; *State v. Mays*, 225 N.C. 486, 35 S.E.2d 494; *State v. Dilliard*, 223 N.C. 446, 27 S.E.2d 85; *State v. Smoak*, 213 N.C. 79, 195 S.E. 72.

[Error Assignments Abandoned]

Defendant's other assignments of error set forth in the Record are not brought forward and mentioned in his brief. In respect to them no reason or argument is stated, and no authority is cited in defendant's brief. They are, under our Rules and decisions, deemed to have been abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 562, *Ibid* in G.S., Vol. 4A, pp. 157, 185; *State v. Bittings*, 206 N.C. 798, 175 S.E. 299; *State v. Gordon*, 241 N.C. 356, 85 S.E.2d 322; *State v. Atkins*, 242 N.C. 294, 87 S.E.2d 507; *State v. Thomas*, 244 N.C. 212, 93 S.E.2d 63; *State v. Adams*, 245 N.C. 344, 95 S.E.2d 902; *State v. Smith*, 249 N.C. 653, 107 S.E.2d 311. See *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126.

In the trial below we find
No error.

TRIAL PROCEDURE Grand Juries—Texas

Milton WILLIAMS v. The STATE of Texas.

Court of Criminal Appeals of Texas, April 30, 1958, 321 S.W.2d 72.

SUMMARY: A Negro man was indicted in 1957 by a Burleson County, Texas, grand jury for the rape of a white girl. Motion to quash and set aside the indictment because of alleged racial discrimination by the court and the jury commissioners in the selection of the grand jury was overruled. On defendant's motion, venue was changed to Lee County, Texas, where he was tried, convicted, and sentenced to death. On appeal, the Texas Court of Criminal Appeals,

in finding that the evidence adduced was insufficient to prove discrimination in the selection of the grand jury, pointed out that: while no Negro served on the grand jury, a Negro had been drawn on the panel but was excused at his request; that while the percentage of the Negro population in the county was shown, there was no evidence as to the number of qualified grand jurors in the county or among its Negro citizens; that while it was shown that only a few Negroes had served on past grand juries, there was no proof concerning the number of Negroes that had been selected for grand jury service. The judgment was affirmed and the motion for rehearing overruled. [Note: The United States Supreme Court denied certiorari. 79 S.Ct. 615.]

WOODLEY, Judge.

The offense is rape; the punishment, death.

The evidence clearly established that appellant, a 27 year old Negro, barricaded a road which a 16 year old white girl traveled nightly in going to her home after leaving the cafe where she was employed as a waitress; assaulted her by striking her with a pistol; robbed and ravished her and threatened to kill her and her whole family if she told what he had done.

The evidence need not be set out in detail, for the rape was established by the testimony of the victim; the confession of appellant; the doctor's testimony as to the wounds inflicted on the girl with the pistol and the evidence of bleeding and ruptured hymen and presence of male sperm in her sexual parts; and the officers' testimony showing that they followed tracks from the scene to where appellant was found with a pistol in his hand; his bloody clothes on the floor, and to where he said he had left the shoes which made the peculiar tracks of which casts were made by the officers.

There are no formal or informal bills of exception in the record.

The offense was committed and the indictment was returned in Burleson County, and venue was changed on appellant's motion to Lee County where the case was tried, both Burleson and Lee being counties of the 21st Judicial District.

* * *

[Jury Selection Bias Alleged]

Motion was filed in Burleson County to quash and set aside the indictment . . . alleging racial discrimination by the court and the jury commissioners in the selection of the grand jury.

By separate orders each of the motions to quash the indictment was overruled, but no exception was reserved to the court's orders.

The evidence adduced in support of the motions to quash is before us and, because of the

nature of the attack upon the indictment and of the extreme penalty being assessed, will be discussed.

* * *

The allegations of the motion to quash because of discrimination alleged that no Negro served as a member of the grand jury which returned the indictment. This was shown to be true, but it was further shown that a Negro was drawn on the panel but was excused at his request.

It was alleged that the population of Burleson County in 1940 was 18,334, of which 36.9 per cent were Negroes, and that in 1950 the population was 13,000 of which 32.3 per cent were Negroes. This was shown, but there was no proof as to the number of qualified grand jurors in the county or among the Negro citizens.

It was alleged that all of the jury commissions from 1943 to 1957, including the jury commission which selected the grand jury which indicted appellant, had consistently limited the number of Negroes selected to no more than two on each grand jury, as a result of which more often than not no Negroes at all served on the grand jury and never more than two had served on a grand jury, although a large number of Negroes were eligible.

[Numbers Selected, Serving]

No evidence was offered showing the number of Negroes that had been selected for grand jury service. The testimony of the district clerk, when asked concerning the number of grand jurors serving from 1945 to 1957 that were Negroes, was to the effect that as many as three had served in 1955, two in 1954 and at other terms, two in some instances, one in others and none in others.

There was evidence showing 465 Negroes paid poll tax in Burleson County in 1956, out of a total of 2406 voting poll taxes paid in the county, but the witnesses could not say how many were freeholders or householders, or how many could

read and write, or how many were of sound mind and good moral character.

It was alleged and established that the jury commissions during the period mentioned were composed entirely of white men, but it is not contended that this fact showed discrimination. We have held that it does not necessarily do so. *Addison v. State*, 160 Tex.Cr.R. 1, 271 S.W.2d 947; *Oliver v. State*, 155 Tex.Cr.R. 461, 236 S.W.2d 143; *McMurrin v. State*, 156 Tex.Cr.R. 434, 239 S.W.2d 632.

The contention that discrimination against members of the Negro race in the selection of grand jury is shown by the record is overruled.

The judgment is affirmed.

ON MOTION FOR REHEARING

MORRISON, Presiding Judge.

Appellant urges that we distinguish his case from several opinions by the Supreme Court of the United States. We shall discuss the cases cited in his brief.

Martin v. State of Texas, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed. 497, merely holds that the allegations in a motion to quash cannot be considered as proof of the discrimination claimed.

In *Smith v. State of Texas*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84, there was a showing as to how many members of the colored race in the county measured up to the qualifications prescribed by the statute for grand jury service; in the case at bar there is no such showing. In *Smith*, there was proof that the names of the colored men who were drawn were systematically placed among the last names on the grand jury list and which, because of the practice of selecting the grand juries from the first names on the list, resulted in the exclusion of members

of the colored race from grand jury service. In the case at bar there was no such showing. In *Smith*, there was proof of how many members of the colored race were selected as well as served. There is no such showing here.

Hill v. State of Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559, was reversed because it was there shown that no member of the colored race had been selected as a grand juror for sixteen years preceding the return of the indictment in that case. In the case at bar it was shown that three members of the colored race served on one grand jury, two on several occasions, one on others, and none on some.

In *Cassell v. State of Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839, there was proof that the jury commissioners made no effort to familiarize themselves with the qualifications of members of the colored race in their community. In the case at bar there was no such showing.

Ross v. State of Texas, 341 U.S. 918, 71 S.Ct. 742, 95 L.Ed. 1352, is a per curiam opinion which cites *Cassell*.

Hernandez v. State of Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866, is authority for the rule that persons of Mexican descent constituted a separate class of citizens from "whites" and, as such, must not be discriminated against in jury selection.

Though not cited, we do observe that in the recent case of *Eubanks v. State of Louisiana*, 78 S.Ct. 970, 973, 2 L.Ed.2d 991, there was proof "that only one Negro had been picked for grand jury duty within memory" in Orleans Parish. The proof set forth above and in our original opinion clearly differentiates this case from *Eubanks*.

Remaining convinced that we properly disposed of this cause originally, appellant's motion for rehearing is overruled.

TRIAL PROCEDURE**Judges—Alabama****NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE v. Walter B. JONES, Judge.**

Supreme Court of Alabama, February 12, 1959, 109 So.2d 140.

SUMMARY: The NAACP petitioned the Alabama Supreme Court to compel the judge of the 15th Judicial Circuit to recuse himself in the case of *State ex rel. Patterson v. NAACP*. [109 So.2d 138, 4 Race Rel. L. Rep. 347, *supra*, (Ala. 1959)] pending in his court. The petition was ordered dismissed for failure of petitioner to comply with court rules requiring that brief and argument in support of the petition be filed within thirty days from the date the case was at issue.

SIMPSON, Justice.

This is a petition to compel respondent, the Honorable Walter B. Jones, Judge of the 15th Judicial Circuit of Alabama, to recuse himself in a certain proceeding styled *The State of Alabama, ex rel. John Patterson, as Attorney General of the State of Alabama v. National Association for the Advancement of Colored People, a Corp.*, now pending in his court.

The respondent Judge waived issuance of the rule nisi, demurred to the petition and also filed an answer thereto. The petitioner thereafter filed a certain pleading purporting to be a replication to the respondent's answer. The case then stood at issue, which was August 19, 1958. To date the petitioner has failed to file with this Court brief and argument in support of said petition. Brief and argument should have been filed within thirty days from the date the case was at issue (Supreme Court Rule 12, Code 1940, Tit. 7 Appendix). The petition, therefore, will be ordered dismissed with a brief explanation.

Revised Rule of the Supreme Court 47 provides that in all appeals involving extraordinary or remedial writs, rules of the Supreme Court shall apply, unless the Court orders otherwise (263 Ala. XXII).

[Supreme Court Rule 12]

Supreme Court Rule 12 stipulates that: "Counsel for appellant shall file his brief with the clerk of this court within thirty days after the transcript of the record has been filed in this court. Upon failure to so file, the appeal shall be dismissed or the case affirmed, as the case may be". We have consistently followed this rule and have dismissed appeals where there has been a noncompliance. *Phalen v. Fort*, 266 Ala. 213, 95 So.2d 401, and cases cited; *Tipton v. Tipton*, 267 Ala. 64, 100 So.2d 14.

While this is not an appeal, we have treated such cases as if appeals and have applied Rule 12. The petition seeks to review the refusal of respondent to recuse himself, and the case is, and has long been, ready for submission. We are advised that the Clerk of the Court notified counsel for petitioner that brief and argument should be filed in accordance with the rule. As observed in *Terry v. State*, 264 Ala. 133, 85 So.2d 449, 450, "This Court will not take submission in civil cases without a brief by appellant". Neither will this Court take submission of a case such as this without a brief in support of the petition seasonably filed. Having thus failed, the petition is subject to dismissal. So ordered.

Petition dismissed.

All the Justices concur.

TRIAL PROCEDURE

Juries—Mississippi

UNITED STATES of America ex rel. Robert Lee GOLDSBY v. William HARPOLE, Superintendent of the Mississippi State Penitentiary.

United States Court of Appeals, Fifth Circuit, January 16, 1959, 263 F.2d 71.

SUMMARY: Goldsby, a Negro, was convicted of murder in a trial court in Mississippi and his conviction was affirmed by the Mississippi Supreme Court. 78 So.2d 762 (1955). Thereafter the United States Supreme Court denied application for a writ of certiorari in which Goldsby alleged for the first time a denial of the equal protection of the laws in that Negroes had been systematically excluded from jury service in the county in which he was tried. 350 U.S. 925 (1955). Goldsby then petitioned the Mississippi Supreme Court for leave to file a writ of error coram nobis on the grounds of newly discovered evidence and the denial of his federal constitutional rights through the exclusion of Negroes from jury service. The court held that the constitutional issue was raised too late and further that there was no evidence to support his claims. 86 So.2d 27, 1 Race Rel. L. Rep. 565 (1956); *cert. denied*, 352 U.S. 944 (1957). Goldsby then petitioned in a federal court for a writ of habeas corpus on the ground that he had been denied due process of law because of the systematic exclusion of Negroes from the jury lists. The district court dismissed the petition, but the Court of Appeals, Fifth Circuit, reversed, holding that Goldsby was entitled to a hearing because of his allegations that he was precluded, by ignorance and the speed of the trial, from raising the issue in the state court. 249 F.2d 417, 3 Race Rel. L. Rep. 66 (5th Cir. 1957). Upon remand, the district court refused to issue a certificate of probable cause, finding that petitioner, 28 years old, with a high school education, and represented throughout by able and competent counsel, had had ample opportunity in state courts to raise the systematic exclusion question but had waived whatever right he may have had to object to jury composition. The Fifth Circuit granted a certificate of probable cause. The facts that a large number of Negroes in the county meet the age and sex qualifications but that none was ever shown to have been on a jury list were held to create a "strong prima facie case" of systematic exclusion which the state had failed to refute. The court found no evidence that appellant had ever authorized counsel to waive objection to systematic exclusion of Negroes from the petit jury and held the judgment of conviction void. However, since objection to the grand jury was found to have been waived, the court held that appellant was legally detained under the indictment, but stipulated that if within eight months he had not been re-tried before a jury from which Negroes have not been systematically excluded, the court would again consider whether he should not be discharged upon this petition for habeas corpus. The district court judgment was reversed and judgment rendered in accordance with these holdings.

Before RIVES, BROWN and WISDOM, Circuit Judges.

RIVES, Circuit Judge.

On September 4, 1954, Bryant Nelms, a white man, and Mrs. Moselle McCorkle Nelms, his wife, were shot by one or more Negroes firing from an automobile after Nelms had ordered the Negroes to leave his gasoline filling station and dairy bar near Vaiden, Mississippi. Mrs. Nelms was killed. Later that same day, Robert Lee Goldsby and several other Negroes in an automobile with him were apprehended and lodged in jail. There was evidence to the effect that a .32 caliber bullet was removed from the body of Mrs. Nelms; that a pistol was obtained

by the sheriff from appellant's possession when he was arrested; that the two were sent to the F.B.I. Laboratory in Washington, D. C.; and that there a ballistics examination identified the bullet as having been fired from appellant's pistol.

On his preliminary trial, the appellant was represented by Messrs. Tighe and Tighe, a law firm of Jackson, Mississippi. On November 8, 1954, a Grand Jury of the Second Judicial Circuit of Carroll County, Mississippi, indicted the appellant for the murder of Mrs. Nelms. By that time, an aunt who lived in Gary, Indiana,

had employed George N. Leighton, Esquire, a Negro attorney of Chicago, Illinois, to defend the appellant. Mr. Leighton appeared with him on his arraignment, the same day that the indictment was returned. A plea of not guilty was entered. The attorney requested and the court granted time for the preparation of motions necessary to raise certain constitutional questions.

November 10th, allowing a lapse of two days, was set as the date of trial. Before that time the attorney had ready for filing a motion to quash the indictment on the ground that Negroes had been systematically excluded from the grand jury, a motion for change of venue, and a petition for removal of the case to the federal court.¹ Before they could be filed, however, appellant's brother and a different aunt had employed John W. Prewitt, Esquire, a white attorney of Vicksburg, Mississippi. Mr. Prewitt told these relatives of appellant that he could not work with the Negro attorney, Mr. Leighton. They informed Leighton of their employment of Prewitt and requested Leighton's withdrawal. Leighton promptly advised the District Attorney and thereafter the court that he was withdrawing from the case. The motions which he had prepared were never filed.

[Attorney Appointed]

The court then appointed Luther Ringgold, Esquire, a white attorney of Winona, Mississippi, to defend the appellant. Mr. Ringgold informed the court that relatives had employed Mr. Prewitt, and both Ringgold and Prewitt defended the appellant skillfully and ably, with the possible exception that they failed to raise the points that Negroes were systematically excluded from the grand jury and from the petit jury. The appellant was convicted and sentenced to death. On appeal to the Supreme Court of Mississippi, his conviction was affirmed.²

Attorneys Ringgold and Prewitt took no further action and have not since appeared in the case. Attorney Leighton re-entered the case and applied for a writ of certiorari to the Supreme Court of the United States, actually urging for the first time the systematic exclusion of Negroes from the grand jury and from the petit jury. Certiorari was denied by the Supreme Court of

the United States.³ The Supreme Court of Mississippi then fixed the date of appellant's execution for February 24, 1956.⁴

Three days theretofore, on February 21, 1956, Mr. Leighton filed for the appellant in the Supreme Court of Mississippi⁵ a petition for writ of error coram nobis, or, in the alternative, habeas corpus, asserting for the first time in the State courts the systematic exclusion of Negroes from the jury lists. The Supreme Court of Mississippi held that the denial of certiorari by the United States Supreme Court was res judicata of the question,⁶ and that the application came too late since no objection to the validity of the juries had been made at the time of trial.⁷

[Certiorari Requested]

Attorney Leighton again petitioned for certiorari to the Supreme Court of the United States. The Clerk of the Supreme Court requested the Attorney General of Mississippi to file a response, stating, "The response should discuss particularly the issues of systematic exclusion of negroes from the grand and petit jury panel and the state procedure for raising this question in a post conviction proceeding." Such a response was of course filed. The Supreme Court denied certiorari.⁸ The Supreme Court of Mississippi again set a date for execution, this time for February 12, 1957.⁹

On January 29, 1957, Attorney Leighton filed for the appellant a petition for writ of habeas corpus in the United States District Court for the Northern District of Mississippi, Greenville Division. Honorable Allen Cox, United States District Judge, after hearing argument but without waiting for an answer, denied the petition on the same day that it was filed and also denied a certificate of probable cause.

3. *Goldsby v. State*, 1955, 350 U.S. 925, 76 S.Ct. 216, 100 L.Ed. 809.

4. *Goldsby v. State*, 1956, 226 Miss. 1, 84 So.2d 258.

5. Pursuant to Chapter 250 of the Laws of Mississippi of 1952, Section 19925, Code of 1942, Recompiled.

6. In that respect, certainly the holding was erroneous. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 1923, 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361. See also, *Darr v. Burford*, 1949, 339 U.S. 200, 202, 226-228, 70 S.Ct. 587, 94 L.Ed. 761, dissenting opinion of Mr. Justice Frankfurter.

7. *Goldsby v. State*, 1956, 226 Miss. 1, 86 So.2d 27.

8. *Goldsby v. State*, 1956, 352 U.S. 944, 77 S.Ct. 266, 1 L.Ed.2d 239.

9. *Goldsby v. State*, 1957, 226 Miss. 1, 91 So.2d 750.

1. Under 28 U.S.C.A. § 1443 and §§ 1446-1449.

2. *Goldsby v. State*, 1955, 226 Miss. 1, 78 So.2d 762.

On February 8, 1957, a motion for stay of execution was denied by Honorable Wayne G. Borah, a Judge of this Court. On February 11, 1957, the Honorable Earl Warren, Chief Justice of the United States, granted a stay of execution "until petitioner has had an opportunity to exhaust his federal rights in this proceeding." This Court thereafter heard the appeal from the decision of Judge Cox and reversed and remanded the cause for a hearing of the evidence.¹⁰

[District Court Opinion]

Upon remand the case was heard at a special session of the court before Honorable Claude F. Clayton, United States District Judge. At the conclusion of the evidence and after hearing argument, Judge Clayton denied the petition, expressing his views in an oral opinion as follows:

"Mr. Court Reporter, take this:

"The issues of fact, as I understand them in this proceeding, are very much as I stated at the beginning of this hearing. For the benefit of counsel in any further proceeding that may arise, I will state my findings of fact and conclusions of law separately.

"First: The proof shows, as I indicated to counsel for petitioner before he made his argument, that the grand jury which returned the indictment against this petitioner had no Negroes on it.

"Second: The proof shows that the petit jury which tried the petitioner had no Negroes on it.

"Third: The proof fails to meet the burden, as I understand it, of showing a 'systematic and willful' exclusion of any member of the Negro race from jury service in that county.

"Fourth: As a matter of fact, it is rather difficult for the Court to distinguish between fact and law in the twilight zone that arises between the two, but as a matter of fact the Court finds that the petitioner has, and had, at the time of his indictment and trial a high school education, and finds as a fact that he was twenty-eight years old at the

time; and finds as a fact that he was represented at the preliminary aspect of the matter by counsel, who were chosen for him by some means not shown by testimony in this record—they being the firm of Tighe & Tighe of Jackson, Mississippi; next, that he was represented by counsel, as the record shows, of his family's selection, Mr. Leighton, at his arraignment; that he was represented by able and competent counsel of his family's selection and employment throughout the trial and in the Supreme Court of Mississippi on appeal, and that in addition he was represented by able counsel appointed by the Circuit Court of Carroll County.

"With these factual findings, the Court could not do otherwise than conclude, as a matter of law, that ample opportunity was afforded this petition to raise in the courts of the State of Mississippi, the constitutional question involved in this hearing, and undoubtedly if the question of the absence of Negroes from the grand jury and the absence of Negroes from the petit jury had been presented in the Circuit Court of Carroll County by a proper motion to quash, such a motion would have been sustained. That is borne out by the case I cited to counsel, *Farrow v. State*, 91 Mississippi 509, 45 Southern 619, decided in 1908.

"The opportunity was there, the decision was made by competent counsel of the family's employment and of the Court's appointment not to raise that question and not to invoke that issue in the lawsuit.

"Under these circumstances, the Court is of the opinion that the petitioner understandingly, in connection with his counsel, waived whatever right he may have had to present any question with respect to the composition of the jury, and that he, therefore, is barred from raising the question here or prevailing on that question being raised in this Court.

"The Court is further of the opinion that the motion for taking of depositions in Chicago is not only untimely, having been filed too late, but from statement of counsel as to the purpose of taking the testimony of those witnesses, in the light of the Court's findings that I have given you, the testimony would not be of any help here."

10. *United States ex rel. Goldsby v. Harpole*, 5 Cir., 1957, 249 F.2d. 417.

[Certificate Refused]

Judge Clayton refused to issue a certificate of probable cause, and the Supreme Court of Mississippi again set a date for execution, this time for May 29, 1958.¹¹ On May 27, 1958, the Chief Justice of the United States again granted a stay of execution "until the petitioner has had an opportunity to exhaust his federal rights in this habeas corpus proceeding." Upon consideration, we now grant a certificate of probable cause.¹²

The present appeal is from Judge Clayton's decision and presents the questions of whether Negroes were systematically excluded from the grand jury and from the petit jury, and whether those objections were waived as to both the grand jury and the petit jury, when not taken on the trial. In so far as it pertains to those issues, the documentary evidence and the testimony of each of the witnesses are summarized at some length in an appendix to this opinion.

I.

WERE NEGROES SYSTEMATICALLY EXCLUDED
FROM THE GRAND JURY AND THE PETIT
JURY OR FROM EITHER

No question is or can be raised as to the validity of the constitutional principle here involved. In *Norris v. State of Alabama*, 1935, 294 U.S. 587, 589, 55 S.Ct. 579, 580, 79 L.Ed. 1074, Chief Justice Hughes, speaking for a unanimous Court, expressed it as follows:

"... Summing up precisely the effect of earlier decisions, this Court thus stated the principle in *Carter v. State of Texas*, 177 U.S. 442, 447, 20 S.Ct. 687, 44 L.Ed. 839, in relation to exclusion from service on grand juries: 'Whenever by any action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder v. State of West Virginia*, 100 U.S. 303, 25 L.Ed. 664; *Neal v. Delaware*, 103 U.S. 370, 397, 26 L.

Ed. 567; *Gibson v. State of Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075.' This statement was repeated in the same terms in *Rogers v. State of Alabama*, 192 U.S. 228, 231, 24 S.Ct. 257, 48 L.Ed. 417, and again in *Martin v. State of Texas*, 200 U.S. 316, 319, 26 S.Ct. 338, 50 L.Ed. 497. The principle is equally applicable to a similar exclusion of negroes from service on petit juries. *Strauder v. State of West Virginia*, supra; *Martin v. State of Texas*, supra."

Many of the pertinent Supreme Court cases are collected in annotations in 94 L.Ed. 856 and 97 L.Ed. 1249. The later cases have been no less positive in sustaining the principle.¹³

[Statutory Protection]

The right is protected also by statute. 18 U.S.C.A. § 243 reads as follows:

"Exclusion of jurors on account of race or color"

"No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000."

Addressing itself particularly to the manner of selection of juries from lists of qualified electors prevailing in Mississippi,¹⁴ a unanimous Supreme Court declared in *Patton v. State of Mississippi*, 1947, 332 U.S. 463, 469, 68 S.Ct. 184, 187, 92 L.Ed. 76:

"... When a jury selection plan, whatever, it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."

11. *Goldsby v. State, Miss.* 1958, 102 So.2d 215.

12. See 28 U.S.C.A. § 2253.

13. See, e. g., *Hernandez v. State of Texas*, 1954, 347 U.S. 475, 74 S.Ct. 687, 98 L.Ed. 866; *Reece v. State of Georgia*, 1955, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77; *Eubanks v. State of Louisiana*, 1958, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991.

14. See Title 10, Chapter 9, Sections 1762-1802, Vol. 2, Mississippi Code 1942 Ann.

In *Eubanks v. State of Louisiana*, 1958, 356 U.S. 584, 587, 78 S.Ct. 970, 973, 2 L.Ed.2d 991, again by a unanimous Court, the foregoing statement from the Patton case, supra, was quoted with approval, to which the Court added:

"* * * This is essentially the situation here. True, the judges now serving on the local court testified generally that they had not discriminated against Negroes in choosing grand juries, and had only tried to pick the best available jurors. But as Chief Justice Hughes said for the Court in *Norris v. State of Alabama*, 294 U.S. 587, 598, 55 S.Ct. 579, 584, 79 L.Ed. 1074, 'If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the [Equal Protection Clause]—adopted with special reference to their protection—would be but a vain and illusory requirement.' Compare *Reece v. State of Georgia*, 350 U.S. 85, 88, 76 S.Ct. 167, 169, 100 L.Ed. 77; *Hernandez v. State of Texas*, 347 U.S. 475, 481, 74 S.Ct. 667, 671, 98 L.Ed. 866."

["Strong Prima Facie Case"]

It can no longer be doubted that proof of long-continued exclusion of Negroes from jury service makes a "strong prima facie case." *Norris v. State of Alabama*, supra, 294 U.S. at page 598, 55 S.Ct. at page 584.¹⁵ In *Hernandez v. State of Texas*, 1954, 347 U.S. 475, 480, 74 S.Ct. 667, 671, the holding was that persons of Mexican descent were systematically excluded from jury service. As to the proof necessary to sustain the charge of discrimination, the Court said:

"Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by *Norris v. State of Alabama*, 294 U.S. 587, 55 S.Ct. 579, 584, 79 L.Ed. 1074. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an ex-

tended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the 'rule of exclusion,' has been applied in other cases, and it is available in supplying proof of discrimination against any delineated class."

In the present case, the naked figures prove startling enough. According to the 1950 United States Census, Carroll County, Mississippi, had a population of 15,448 persons, of which 8,836 or more than fifty-seven per cent were nonwhite, predominantly Negroes.¹⁶ Of the non-white population, 1,949 were males twenty-one years of age and over.¹⁷ The median school years completed by the nonwhite population of Carroll County, twenty-five years of age and over, were 5.2 years. Yet none of the officials called as witnesses—the Circuit Clerk, the Chancery Clerk, the Sheriff, the ex-Sheriff who had served for twenty years, the District Attorney, or the Circuit Judge—could remember any instance of a Negro having been on a jury list of any kind in Carroll County.¹⁸

[Burden on Appellee]

We cannot assume that Negroes, the majority class in Carroll County, had en masse, or in any substantial numbers, voluntarily abstained from registering as electors^{18a} and, by such action, had rendered themselves ineligible for jury duty. If the registration officials freely and fairly registered qualified Negroes as electors, that fact rested more in the knowledge of the State. The burden was on appellee, as the State's

16. Of the male nonwhite population, 4,412 were Negroes, 4 were of other races. Of the female non-white population, 4,417 were Negroes, 3 were of other races.

17. Only males twenty-one years of age and over could be competent jurors in Mississippi. Section 1762, Vol. 2, Mississippi Code 1942 Ann.

18. That is true even if full weight be given to the testimony of several of the officials to the effect that they were unable accurately to distinguish between whites and Negroes. That testimony tends to negative the sharp distinction between whites and Negroes habitually drawn in nearly all parts of the South. We would expect that distinction to be no less definite in Mississippi in the light of the decision of the Mississippi Supreme Court to the effect that " * * * descendants of Africans are classed as members of the colored race, regardless of the admixture, as long as there is an appreciable amount of negro blood found." *Moreau v. Grandich*, 1917, 114 Miss. 560, 75 So. 434, 435.

18a. As has been said, in Mississippi, to be eligible for jury duty one must be a qualified elector. See Footnote 14, supra.

15. See also, *Patton v. State of Mississippi*, 1947, 332 U.S. 463, 468, 68 S.Ct. 184, 92 L.Ed. 76; *Reece v. State of Georgia*, 1955, 350 U.S. 85, 88, 76 S.Ct. 167, 100 L.Ed. 77.

representative, to refute the strong *prima facie* case developed by the appellant.¹⁹ The only Negroes ever proved registered as electors in Carroll County were two who had died before 1954.

We have called the figures startling, but we do not feign surprise because we have long known that there are counties not only in Mississippi, but in the writer's own home State of Alabama,²⁰ in which Negroes constitute the majority of the residents but take no part in government either as voters or as jurors. Familiarity with such a condition thus prevents shock, but it all the more increases our concern over its existence.²¹ When, in a proper case such as this, there is added to our common knowledge proof that some of the Negro citizens are qualified educationally and by other legal standards but are excluded from serving as jurors solely because of their race or color, the courts must declare the maintenance of such a condition

violative of the Constitution and must not tolerate its longer continued existence.

In our opinion, the appellant proved a strong *prima facie* case that Negroes were systematically excluded from the grand jury and from the petit jury, and that case was not refuted by the State.

II.

WERE OBJECTIONS TO SYSTEMATIC EXCLUSION OF NEGROES EFFECTIVELY WAIVED?

The more serious questions are whether objections to the systematic exclusion of Negroes from the grand jury and to a like exclusion from the petit jury were waived when they were not made at the trial.

In deciding those questions, we should understand exactly the nature of the right under consideration. Usually the discrimination has been condemned as a denial of the equal protection of the laws. It has been indicated, however, that under certain circumstances it may constitute also a denial of due process of law.²²

[Denial of Equal Protection]

The denial of the equal protection of the laws is especially marked when the defendant is a Negro and the victim is a white person; that is when the right is viewed narrowly and strictly from the viewpoint of the accused. Looking at it more broadly from the interest of the public in the administration of justice, systematic exclusion of Negroes from juries can result in inadequate protection of law-abiding Negroes against the criminal elements of their own race. The necessity for protection may not be brought close enough home to white jurors to prevent them from being too lenient with Negroes who commit crimes against other Negroes. The Constitution provides to law-abiding Negroes also the safeguard that members of their race shall not be systematically excluded from juries. The denial of the equal protection of the laws extends also to civil cases in which the lists of jurors are drawn from a jury box from which the names of Negroes have been systematically excluded. Thus, the right is one of broad significance closely and vitally connected with the proper administration of justice in both civil and criminal cases.

19. *Patton v. State of Mississippi*, and *Reece v. State of Georgia*, *supra*, note 15.

20. Compare *Davis v. Schnell*, D.C.S.D. Ala. 1949, 81 F.Supp. 872, 879, affirmed as *Schnell v. Davis*, 1949, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 and the public debates which preceded the adoption of the "Boswell Amendment" there declared unconstitutional.

21. Situations like that were disturbing at a much earlier period of our Country's life. In 1832, more than a century and a quarter ago, de Tocqueville wrote:

"I said one day to an inhabitant of Pennsylvania: 'Be so good as to explain to me how it happens that in a state founded by Quakers, and celebrated for its toleration, free blacks are not allowed to exercise civil rights. They pay taxes; is it not fair that they should vote?'"

"'You insult us,' replied my informant, 'if you imagine that our legislators could have committed so gross an act of injustice and intolerance.'"

"Then the blacks possess the right of voting in this country?"

"Without a doubt."

"How come it, then, that at the polling-booth this morning I did not perceive a single Negro?"

"That is not the fault of the law. The Negroes have an undisputed right of voting, but they voluntarily abstain from making their appearance."

"A very pretty piece of modesty on their part!" rejoined I.

"Why, the truth is that they are not disinclined to vote, but they are afraid of being maltreated; in this country the law is sometimes unable to maintain its authority without the support of the majority. But in this case the majority entertains very strong prejudices against the blacks, and the magistrates are unable to protect them in the exercise of their legal rights."

"Then the majority claims the right not only of making the laws, but of breaking the laws it has made?"

Democracy in America by Alexis de Tocqueville, Vol. 1, Chapter 15, page 261, quoted by Professor Roland M. Harper of the University of Alabama in his letter to the Editor of the *Montgomery Advertiser* published December 17, 1958.

22. See *Fay v. People of State of New York*, 1947, 332 U.S. 261, 284, note 27, 67 S.Ct. 1613, 91 L.Ed. 2043; *Alkins v. State of Texas*, 1945, 325 U.S. 398, 403, 65 S.Ct. 1276, 89 L.Ed. 1692.

[Justice Jackson Quoted]

Mr. Justice Jackson dissenting in *Cassell v. State of Texas*, 1950, 339 U.S. 282, 301, 70 S.Ct. 629, 638, 94 L.Ed. 839, commented that,

"* * * in the earlier cases where convictions were set aside, the discrimination condemned was present in selecting both *grand and trial jury* and, while the argument was chiefly based on the latter, the language of the opinions made no differentiation, nor for their purpose did they need to. Cf. *Strauder v. State of West Virginia*, 100 U.S. 303, 25 L.Ed. 664; *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567; see also *Bush v. Commonwealth of Kentucky*, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354; *Gibson v. State of Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075; *Hale v. Commonwealth of Kentucky*, 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed. 1050."²³

Continuing, Mr. Justice Jackson said:

"It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least may, prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand. The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh. A single juror's dissent is generally enough to prevent conviction. A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot have the appearance, of impartiality, especially when the accused is a Negro and the alleged victim is not.

"The grand jury is a very different institution. The States are not required to use it at all. *Hurtado v. People of State of California*, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232. Its power is only to accuse, not to convict. Its indictment does not even create a presumption of guilt; all that it charges must later be proved before the trial jury, and then beyond a reasonable doubt. The grand jury need not be unanimous. It

does not hear both sides but only the prosecution's evidence, and does not face the problem of a choice between two adversaries. Its duty is to indict if the prosecution's evidence, unexplained, uncontradicted and unsupplemented, would warrant a conviction. If so, its indictment merely puts the accused to trial. The difference between the function of the trial jury and the function of the grand jury is all the difference between deciding a case and merely deciding that a case should be tried." *Cassell v. State of Texas*, supra, 339 U.S. at pages 301, 302, 70 S.Ct. at pages 638, 639.

[Fair Trial Jury Important]

Mr. Justice Jackson's dissenting opinion is, of course, entitled to no weight as a precedent. We think, however, that the quoted reasoning is sound. Further, the Supreme Court of Georgia, in language not less forceful, has also pointed out how much more important to an accused is the right to a fair and nondiscriminatory jury in the case of a trial jury than in that of a grand jury. *Hall v. State*, 1909, 7 Ga.App. 115, 66 S.E. 390, 392. It may be significant that in *Michel v. State of Louisiana*, 1955, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83, attention was called three times, (350 U.S. at pages 93, 96, and 99, 76 S.Ct. at pages 160, 161, and 163) to the fact that there no attack was made on the composition of the petit jury.

Usually it is clear, and in the present case especially so, that, regardless of its composition, any grand jury would insist that the accused be brought to trial. When it comes to the actual trial, however, the decision of whether to submit to trial before a jury in the selection of which the defendant's race has been systematically excluded presents a problem fraught with far more serious consequences. The apprehended existence of prejudice was one inducement which led to the adoption of the Fourteenth Amendment.²⁴ Systematic exclusion of members

23. In addition to the cases cited by Mr. Justice Jackson, see those collected and separated as to the type of jury involved in annotations in 94 L.Ed. 856 and 97 L.Ed. 1249.

24. " * * * It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manu-

of a defendant's race from a trial jury would, we think, be violative both of the equal protection clause and of the due process clause of the Fourteenth Amendment.

[Positive Discrimination]

Such positive discrimination is more serious and damaging than the mere negative absence of one of the twelve jurors considered in *Patton v. United States*, 1930, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854. In that case, the Supreme Court said:

"* * * Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of

mission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

"In view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?" *Strauder v. State of West Virginia*, 1879, 100 U.S. 303, 309, 25 L.Ed. 664.

trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." 281 U.S. at pages 312, 313, 50 S.Ct. at page 263.

The United States Constitution does not guarantee to a defendant in a State court a trial before a jury in which his race is proportionately represented, nor a trial before a jury composed in any part of members of his race,²⁵ nor even to a jury trial at all, if other defendants are not accorded a jury trial.²⁶ It does assure him of equal treatment under the law and that, so long as the State elects to accord jury trials, it must not systematically exclude from jury service qualified persons of his race. "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race." *Cassell v. State of Texas*, supra, 339 U.S. at page 287, 70 S.Ct. at page 632.

[Defendant's Problems]

The fact that the prohibition is aimed at a system often makes it practically inadvisable for a defendant in a particular case to raise the issue. If Negroes were placed upon the list or venire, their names might easily be stricken before the particular jury was selected and impaneled. To a single defendant, then, the principle involved is often of doubtful or no value and he may forego seeking its protection, though it cannot be denied that from a broader, overall consideration, the long-continued, systematic and arbitrary exclusion of qualified Negro citizens from service on juries solely because of their race or color deprives every Negro of the equal protection of the law.

Moreover, the very prejudice which causes the dominant race to exclude members of what it may assume to be an inferior race from jury service operates with multiplied intensity against one who resists such exclusion. Conscientious southern lawyers often reason that the prejudicial effects on their client of raising the issue

25. *Commonwealth of Virginia v. Rives*, 1879, 100 U.S. 313, 322-323, 25 L.Ed. 667; *Neal v. Delaware*, 1880, 103 U.S. 370, 394, 26 L.Ed. 567; *Martin v. State of Texas*, 1906 200 U.S. 316, 321, 26 S.Ct. 338, 50 L.Ed. 497; *Cassell v. State of Texas*, 1950, 339 U.S. 282, 287, 70 S.Ct. 629, 94 L.Ed. 839.

26. *Maxwell v. Dow*, 1900, 176 U.S. 581, 20 S.Ct. 494, 44 L.Ed. 597; *Snyder v. Commonwealth of Massachusetts*, 1934, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674.

far outweigh any practical protection in the particular case. Many entertain the view expressed by Mr. Justice Jackson concurring in the result in *Shepherd v. State of Florida*, 1951, 341 U.S. 50, 55, 71 S.Ct. 549, 551, 95 L.Ed. 740:

"* * * I do not see, as a practical matter, how any Negro on the jury would have dared to cause a disagreement or acquittal. The only chance these Negroes had of acquittal would have been in the courage and decency of some sturdy and forthright white person of sufficient standing to face and live down the odium among his white neighbors that such a vote, if required, would have brought. To me, the technical question of discrimination in the jury selection has only theoretical importance."

Such courageous and unselfish lawyers as find it essential for their clients' protection to fight against the systematic exclusion of Negroes from juries sometimes do so at the risk of personal sacrifice which may extend to loss of practice and social ostracism.

[Judicial Notice Taken]

As Judges of a Circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries. The Supreme Court of Mississippi has said that, "We have the right to make use of knowledge of the popular and general customs of the people of this State, and public conditions therein." *Moore v. Grillis*, 1949, 205 Miss. 865, 39 So.2d 505, 508, 10 A.L.R.2d 1425. A like authority and duty is vested in this Court.²⁷

The evidence in this case (see appendix) fairly considered shows no waiver by the appellant himself but at most by his counsel without his express authority. In ordinary procedural matters, the defendant in a criminal case is bound by the acts or nonaction of his counsel.²⁸ That might extend to the waiver of the objection

that Negroes were systematically excluded from the grand jury. In noncapital cases, it might extend to a like waiver as to the petit jury. It might extend to such a waiver even in capital cases, where the record affirmatively shows that the particular jury was desired by defendant's counsel after conscientious consideration of that course of action which would be best for the client's cause.²⁹

[Waiver Discussed]

In this case, neither of the petitioner's trial attorneys has appeared or has been called to testify to any reason for waiving his client's constitutional right to a legally constituted trial jury, and no good reason appears otherwise from the record. The very heinousness of the crime and the weight of the physical evidence³⁰ made it all the more necessary that the defendant's constitutional rights be not lightly or unadvisedly surrendered. The State trial judge testified that, "had such a motion been made and proved, that would have been sustained." As Judge Clayton commented, that is borne out by the case of *Farrow v. State*, 1908, 91 Miss. 509, 45 So. 619. However strong might be the evidence of guilt, there was a possibility that a non-discriminatory judge might not impose capital punishment. That chance was waived by defendant's counsel, so the District Court held.

If for any reason beyond the defendant's control, upon his trial for murder, the defendant did not have the effective representation of counsel at the time of a purported waiver by such counsel without consulting the client of the right to be tried before a legally constituted jury, such waiver can be given no effect.³¹

[Limitations Upon Attorney]

Even in handling civil litigation, there are limitations upon the implied authority of an attorney to make decisions for his client.³² Few,

27. *City of Hughes Springs, Tex. v. Lips*, 5 Cir., 1941, 118 F.2d 238; *Rogers v. Douglas Tobacco Board of Trade*, 5 Cir., 1957, 244 F.2d 471, 478; *Mays v. Burgess*, 1945, 79 U.S.App.D.C. 343, 147 F.2d 869, 873, 162 A.L.R. 168; 20 Am.Jur., Evidence, Sec. 108.

28. See *Floyd v. United States*, 5 Cir., 260 F.2d 910, and cases there cited; *Mitchell v. United States*, D.C.Cir., 259 F.2d 787.

29. See *Williams v. State of Georgia*, 1955, 349 U.S. 375, 377, 378, 379, 75 S.Ct. 814, 99 L.Ed. 1161; *Id.*, 211 Ga. 763, 88 S.E.2d 376; *Carruthers v. Reed*, 8 Cir., 1939, 102 F.2d 933, 938; *United States ex rel. Jackson v. Brady*, 4 Cir., 1943, 133 F.2d 476, 481.

30. See the first paragraph of this opinion.

31. See *Bovey v. Grandsinger*, 8 Cir., 1958, 253 F.2d 917, 922; 53 Michigan Law Review (1954-55). Recent Decisions, pp. 885-887, commenting on *Harvey v. United States*, 1954, 94 U.S.App.D.C. 303, 215 F.2d 330, and Judge Danaher's dissent in that case; compare *Mitchell v. United States*, supra note 28.

32. 5 Am.Jur., Attorneys at Law, Sec. 92; 7 C.J.S. Attorney and Client § 100, pp. 919, 922.

if any, would argue that, without consulting his client, an attorney has implied authority to submit his cause to arbitration, or to any but a legally constituted tribunal. When not merely the client's property but his life is at stake, it is all the more essential that an attorney should advise with his client before waiving objections to a trial jury unconstitutionally and discriminatorily constituted.

The Negro lawyer was ready and willing to raise the issue of systematic exclusion of Negroes from the juries. The white lawyer, who was retained, refused to join with the Negro lawyer in the defense of appellant. When, upon request of the appellant's relatives, the Negro lawyer had left the case, the white lawyers failed to raise the issue. When the white lawyers had finished with the trial of the case, that issue was left as the only one that could save the appellant's life. The Negro lawyer then took over and raised the issue.

In *Johnson v. Zerbst*, 1938, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, the Supreme Court declared:

"... It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."³³

[Right Not Waived]

The conditions giving rise to serious doubt as to whether the failure to make the objection at the trial constituted a voluntary and intelligent waiver of appellant's constitutional rights are all matters for which the State of Mississippi must bear responsibility. It is in a poor position to insist upon waiver.³⁴ Upon this record, we hold that the appellant's constitutional right to be

tried before a petit jury from which Negroes have not been systematically excluded has not been effectively waived by counsel authorized to make such waiver.

We have considered remanding this cause again for the development of a more full and adequate record. No record was developed originally, and our previous decision (249 F.2d 417) remanded the case so that the evidence might be heard and considered. The appellant has been confined to jail or in the penitentiary for more than four years, and has not yet been tried before a legally constituted petit jury, nor has his right to such a trial been effectively waived. Inevitably, more months must elapse before he can be tried in conformity with the Constitution. We have concluded that to remand the case again for development of the record is not consistent with the promptness of disposition so essential in habeas corpus proceedings, nor with the right of the appellant to a speedy as well as a fair trial.

[Systematic Exclusion Found]

Upon the present record, therefore, we make definitive holdings as follows: that Negroes were systematically excluded both from the grand jury which indicted the appellant and from the petit jury which convicted him; that the objection as to the petit jury was not effectively waived and, hence, that the judgment of conviction is unconstitutional, subject to collateral attack, and is declared to be void and of no effect; that the objection as to the grand jury was waived, and the appellant is now legally detained upon his indictment for murder, but that he is entitled to be tried within a reasonable time; that this Court retains jurisdiction for the entry of such further orders and judgments as may be necessary or proper.³⁵

The Court expresses its present opinion that a period of eight months from and after the entry of this judgment or its final test by certiorari or otherwise will be sufficient to afford the State of Mississippi and opportunity to take the necessary steps to re-try the appellant, either upon the present indictment or upon a subsequent legal

33. See also, *Emspak v. United States*, 1955, 349 U.S. 190, 198, 75 S.Ct. 687, 99 L.Ed. 997, and cases there cited.

34. Compare *Pollock v. Williams*, 1944, 322 U.S. 4, 16, 64 S.Ct. 792, 88 L.Ed. 1095; *Moser v. United States*, 1951, 341 U.S. 41, 47, 71 S.Ct. 553, 95 L.Ed. 729.

35. See *Dowd v. United States ex rel. Cook*, 1951, 340 U.S. 206, 210, 71 S.Ct. 262, 95 L.Ed. 215; *Mahler v. Eby*, 1924, 264 U.S. 32, 46, 44 S.Ct. 283, 68 L.Ed. 549; *United States ex rel. Sheffield v. Waller*, D.C.W.D.La.1954, 126 F.Supp. 537, 546, certificate of probable cause denied 5 Cir., 1955, 224 F.2d 280; 28 U.S.C.A. § 2106; 28 U.S.C.A. § 2243, last sentence and footnotes 479 and 480.

presentment for the same offense, as the State may elect. If the appellant has not been re-tried within such period, this Court will consider and decide whether or not he should be discharged upon this petition for habeas corpus.

Any such re-trial must of course be before a jury from which Negroes have not been systematically excluded, or before some court or tribunal so constituted as not to violate his constitutional rights. For the guidance of the parties, the Court expresses the further present opinion that if the appellant is re-tried, and if any question should arise as to the legality or constitutionality of such trial, that should be decided not upon the present petition but in the regular

course by the Courts of the State of Mississippi, subject to possible review by the Supreme Court of the United States.

The judgment of the District Court is reversed and judgment here rendered in accordance with the holdings of this opinion.

Reversed and rendered.

Appendix

[A "Summary of Extracts from Evidence in District Court on Issues of Systematic Exclusion of Negroes from Grand Jury and Petit Jury and on Whether Such Objections Were Waived," was added as an appendix to the opinion.]

TRIAL PROCEDURE

Petit Juries—Texas

Juan MORALES v. STATE OF TEXAS

Court of Criminal Appeals of Texas, February 4, 1959, 320 S.W.2d 340.

SUMMARY: In a prosecution for driving while intoxicated, a Texas county court denied defendant's motion to quash the array of jurors on the ground of discrimination in the selection of the jury panel by deliberate failure to include any person of Mexican or Latin American extraction. The Texas Court of Criminal Appeals affirmed because there was no formal bill of exception nor statement of facts adduced on the trial or upon the motion to quash from which the correctness of the trial court's ruling could be appraised.

TRIAL PROCEDURE

Petit Juries—Louisiana

STATE OF LOUISIANA v. Samuel COLEMAN

Supreme Court of Louisiana, January 12, 1959, 108 So.2d 534.

SUMMARY: A Negro, prosecuted in a St. Helena Parish, Louisiana, court for negligent homicide resulting from an automobile collision, moved to quash the petit jury venire and for a change of venue, alleging that he could not receive a fair trial because there had been a systematic exclusion of Negroes from the jury panel. Both motions were overruled, defendant was convicted, and he appealed. The Supreme Court of Louisiana affirmed, holding that systematic exclusion was not proven by showing that although the ratio of registered voters in the parish was about 5 whites to 4 Negroes, only one of 30 persons on the jury panel was a Negro. The court said that to justify the finding of a denial of equal protection, there must be evidence of a planned exclusion of, or inclusion of a token number of, Negroes or a course of conduct which results in continuing exclusion.

LEGISLATURES

EDUCATION

Public Schools—Alabama

Act No. 5 (Senate Joint Resolution 1) of the 1959 special session of the Alabama Legislature, approved February 6, 1959, memorializes Congress to call a constitutional convention to consider submitting to state legislatures an amendment declaring states to have "the power to establish, maintain and exclusively control a system of public education . . . consistent with the economic, cultural and social needs of each of the several states."

WHEREAS education since its acceptance as an obligation of government has been considered the exclusive responsibility of the several states, and

WHEREAS, the several states over a period of years have invested great sums of money in establishing systems of public education within their respective boundaries suited to the economic, cultural and social requirements of each of said states, and,

WHEREAS, no system of public education can long survive, which is not responsive to the needs and demands of the people it serves, and

WHEREAS, only those systems of public education maintained, administered and exclusively controlled by the several states they serve, can enjoy the necessary support from the people essential to an atmosphere conducive to the transmission of knowledge to young students, and

WHEREAS, the Federal Government is now engaged in extending its regulatory powers into the field of public education in the several states, and

WHEREAS, there is grave danger of this extension of the power of the Federal Government resulting in a system of national public education dedicated to the requirements of a super government, rather than to the needs of the several states; now, therefore

BE IT RESOLVED by the Senate, the House of Representatives concurring, that the Legislature of Alabama, as provided in Article V of the Constitution of the United States of America, does hereby make application to and memorialize the Congress of the United States of America to call a convention to consider submitting to the Legislatures of the several states an amendment to the Constitution of the United States of America in substantially the following form:

"The several states shall have the power to establish, maintain and exclusively control a system of public education within their respective boundaries consistent with the economic, cultural and social needs of each of the several states."

BE IT FURTHER RESOLVED, that copies of this Resolution be transmitted by the Secretary of State to the Clerk of the House of Representatives of the United States of America, to the Secretary of the Senate of the United States of America, and to each member of the Alabama delegation to the Congress of the United States of America to be filed and presented by said delegation to the Congress of the United States of America.

BE IT FURTHER RESOLVED, that the Legislature of Alabama does hereby respectfully request the Legislatures of the several states of the United States of America to join in presenting similar applications to the Congress of the United States of America.

EDUCATION

Public Schools—Arkansas

Act No. 151 of the 1959 Arkansas General Assembly, approved March 3, 1959, amends Act No. 5 of the 1958 Extraordinary Session [3 Race Rel. L. Rep. 1043 (1958)], which provided for the withholding of state funds during the time any school is closed by the order of the governor, to provide similarly for withholding such funds also "whenever any person of school age shall be accepted for enrollment in any school other than the one in which he normally would attend." Another provision of Act No. 5, authorizing the State Board of Education to pay over the pro rata share of funds withheld from a closed school to other public or non-profit private schools to which students of the closed schools should elect to attend, is amended to apply also to cases of "students eligible to attend any racially integrated school" who transfer to other public or non-profit private schools. The act as amended appears below, with new language italicized.

AN ACT to amend sections 2 and 3 of Act 5 of the acts of the 2nd Extraordinary Session of the 61st General Assembly, approved September 12, 1958; and for other purposes.

WHEREAS, the Supreme Court of the United States predicated its school integration decision upon the psychological effect of segregated classes upon children of the Negro race, and, at the same time, ignored the psychological impact of integrated schools upon certain white children who observe segregation of the races as a way of life; and

WHEREAS, legislation is necessary in order to protect the health, welfare, well-being, and educational opportunities of such white children;

Now therefore be it enacted by the General Assembly of the State of Arkansas:

Section 1. Section 2 of Act 5 of the Acts of the 2nd Extraordinary Session of the 61st General Assembly of the State of Arkansas, approved September 12, 1958, is hereby amended to read as follows:

"Section 2. Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall have been countermanded by the Governor, or whenever any person of school age shall be accepted for enrollment in any school other than the one in which he normally would attend, the State Board of Education, acting through its Commissioner of Education, shall cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such closed school, or over any such school which

any such person of school age normally would attend, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school, or in the school which any such person would normally attend, bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order, or next preceding the date of acceptance for enrollment of any such student in the school which he normally would attend, for the benefit of the said school district for maintenance and operation; plus, also from State funds, an amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School Fund, all as set forth in the budget of the County Board of Education."

Section 2. Section 3 of Act 5 of the Acts of the 2nd Extraordinary Session of the General Assembly of the State of Arkansas, approved September 12, 1958, is hereby amended to read as follows:

"Section 3. Should any of the students of any school so closed by order of the Governor, or any of the students eligible to attend any racially integrated school, determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld

as hereinbefore provided, shall be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of *transferred* students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds *from time to time made available to the State Board of Education, including but not limited to those contained in Act 305, approved March 27, 1957*, shall be useable for the purposes herein provided."

Section 3. If for any reason any section or provision of this Act shall be held to be unconstitutional, or invalid for other reason, it shall not affect the remainder of this Act.

Section 4. It has been found, and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed

to the limitation of attendance by students of the public schools of the State to the schools in which they are now enrolled, or may be eligible for enrollment; that such limitation of attendance results in dissatisfaction on the part of students, lack of interest and effort in their school curricula, and a psychological impairment of the health and welfare of such students; that private, accredited schools and other public schools are more suitable for such students than their resident schools; that the state of feeling of the great majority of the people of this State is such that inability to transfer freely to accredited private schools and other public schools will seriously impair the operation of a suitable and efficient system of schools, the psychological well-being of the students, and result in lack of discipline in the schools; that for said reasons, it is hereby declared necessary for the public peace, health, and safety that this Act shall become effective without delay. An emergency, therefore, exists, and this Act shall take effect and be in force from and after its passage.

EDUCATION

Public Schools—Tennessee

Chapter No. 289 (House Bill No. 647) of the Public Acts of the 1959 Session of the Tennessee General Assembly, approved March 28, 1959, amends compulsory attendance laws by replacing a former provision making their enforcement the duty of local education officials "in cooperation with other state and county agencies," with a substituted provision that such enforcement shall be the "sole responsibility" of local education officials, and by adding a provision that for "any good and substantial reason" as determined by a child's parent or guardian and agreed to by the local board of education a child may be withdrawn from one public school and placed in another designated by the board or in a private school. This chapter also repeals provisions permitting the state commissioner of education to withhold and declare forfeited state school appropriations of any county, city, or special school district which refuses or neglects to comply with and enforce the compulsory attendance laws.

AN ACT to amend Section 49-1711, and to repeal Section 49-1728 of Tennessee Code Annotated.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Section 49-1711 of Tennessee Code Annotated be and the same is hereby amended by striking the first sentence in the first paragraph of said section

and substituting in lieu thereof the following sentence:

"The sole responsibility and authority for the enforcement of the compulsory attendance laws, Sections 49-1708-49-1728 of Tennessee Code Annotated be and the same are hereby placed in the board of education, and its designated employees and officers,

of each county, city, and special school district within the State."

Provided, however, that for any good and substantial reason as determined by a parent or other person having legal custody of a child and agreed to by the respective local board of education, such parent or person may withdraw his child from a public school provided within thirty (30) days the parent or person having legal custody

of the child places the child in a public school designated by such local board of education, or in a private school.

Section 2. *Be it further enacted,* That Section 49-1728 of Tennessee Code Annotated be and the same is hereby repealed.

Section 3. *Be it further enacted,* That this Act shall take effect from and after its passage, the public welfare requiring it.

EDUCATION Public Schools—Virginia

On February 5, 1959, Governor Almond of Virginia appointed a Commission on Education (known as the "Perrow Commission") to make recommendations by March 31, 1959, for "meeting the crisis brought about by a series of judicial decrees affecting the Public Free School System of Virginia." [See cases at 4 Race Rel. L. Rep. 29-65 (1959) and Governor Almond's address to the Virginia General Assembly at 4 Race Rel. L. Rep. 183, 187 (1959)]. The majority report of the Commission, a dissenting report, concurring and dissenting statements by individual Commission members, and titles of bills recommended by the majority of the Commission appear below.

EDUCATION IN VIRGINIA REPORT OF THE COMMISSION ON EDUCATION

Richmond, Virginia
March 31, 1959

To: Honorable J. Lindsay Almond, Jr., *Governor of Virginia:*

Your Commission was appointed February 5, 1959, to make recommendations by March 31, 1959, for meeting the crisis brought about by a series of judicial decrees affecting the Public Free School System of Virginia.

SYNOPSIS

Five years ago, on May 17, 1954, the Supreme Court, in the case of *Brown v. Board of Education*, 347 U.S. 483, startled the nation and shocked the South by striking down the provisions of State Constitutions and laws requiring racial separation of children in public schools. Never before had the court rendered a decision so drastically invading the right of the states to

manage their internal affairs. The reaction in Virginia was prompt, positive and adverse.

The General Assembly of Virginia in keeping with the overwhelming sentiment of the people of this State made every effort to preserve our system of separate schools. The efforts included the invocation of the police powers of the State, state sovereignty, interposition and state immunity from suit. They also included an effort by the General Assembly to interpret "efficient" schools in keeping with the policy of the State, and a cut-off of funds and the closing of schools.

One by one these laws have been struck down, some by the federal courts and some by the Supreme Court of Appeals of Virginia. None of these laws can be made effective against overwhelming federal force.

As the result of the *Brown* decision, and subsequent court decrees, racial integration has already taken place in some school divisions in Virginia. Every resource known to the law was exhausted in the defense of every case before the courts. All in authority in Virginia have exhausted every legal means of preventing any integration in our schools. Our officials are en-

titled to commendation of their unswerving devotion to the cause committed to them.

When the decrees became final, the course to be followed was clear. Under the firm, courageous and dedicated leadership of those in authority, Virginia responded in keeping with her best and finest traditions, and under the most trying circumstances, set for the nation an example of respect for law and order of which we can be justly proud. There was no mob rule, no violence, no ugly incident.

We are now faced with decision. The Commission believes that it is its duty to present the problem with complete frankness. The truth is that neither the General Assembly nor the Governor has the power to overrule or nullify the final decrees of the federal courts in the school cases.

There is sentiment that it would be better to have no public schools than to have any mixed schools anywhere in Virginia. However, we believe that at this time a majority of the people of Virginia is unwilling to have the public schools abandoned.

Accordingly, we propose measures to bring about the greatest possible *freedom of choice* for each locality and each individual.

We recommend that scholarships be made available to children in every locality to attend nonsectarian private schools.

We recommend a flexible pupil placement plan to meet the varied conditions throughout the State.

We recommend a compulsory attendance law with adequate safeguards which may be used by any locality that desires to do so.

We recommend additional legislation for disposal of surplus school property.

We recommend local budgetary changes which will give the local tax levying body full control over local expenditures to the end that a locality faced with an intolerable situation can constitutionally withhold local support from public schools by the simple method of not levying taxes or appropriating money.

Under these recommendations no child will be forced to attend a racially mixed school.

We believe that under present conditions these proposals will produce results more acceptable to the people of Virginia than abolition of all public schools. If not, and if the people then demand the abolition of all public schools, the people themselves can decide that issue at that time.

Despite the widespread belief to the con-

trary, the repeal by itself of Section 129 of the Constitution of Virginia would accomplish nothing that cannot be accomplished by statute. In view of the foregoing, no constitutional amendment is necessary and none is recommended.

These proposals permit the preservation of public free schools and implement flexible local autonomy. They are founded on the twin principles of local determination and *freedom of choice*.

THE PROBLEM

It would be wholly unrealistic for this Commission not to state with all frankness that its creation was made necessary and that it came into being as a result of the great constitutional and social issues that have faced this country since the Brown decision, which held the states could not operate racially segregated public schools.

Following the Brown decision, all of Virginia's neighboring States and some other States in the South began integrating their public schools, while schools in this State remained segregated until February of this year by reason of the determined stand on the part of representatives of the State and of the various localities. Notwithstanding the supreme efforts that were made, Virginia was unsuccessful in sustaining the laws that were designed to prevent integration.

Subsequent to the Brown decision Louisiana amended its constitution to provide for segregated schools under the authority of its police powers. It was held by the federal courts that the police powers cannot be invoked to preserve segregated schools. *Orleans Parish School Board v. Bush*, 242 F.2d 156. Since a writ of certiorari was denied in this case by the Supreme Court, it is evident that it would be futile to assert again such a defense.

In the Charlottesville and Arlington school cases, it was strongly advocated that the plaintiffs could not maintain those actions on the ground they were suits against the State and thus prohibited by the Eleventh Amendment of the Federal Constitution. It was held that the immunity of a state from suit under the Eleventh Amendment did not prevent action to enjoin state officials from depriving persons of their constitutional rights. *School Board v. Allen*, 240 F.2d 59. The Supreme Court refused to review this decision.

The hope that the Supreme Court would modify or reverse the Brown decision was shattered on September 29, 1958, in the Little Rock case, *Aaron v. Cooper*, 358 U.S. 1.

The problem which confronts this Commission, the General Assembly and the Commonwealth of Virginia, can be understood only in the light of the following quotations from court decisions.

In *Aaron v. Cooper*, with three new Justices sitting, the Supreme Court not only unanimously reaffirmed the Brown decision, but went even further and held:

"It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. * * * State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of law. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law."

Obviously the sweeping decision was written with the laws of Virginia and other Southern States in mind.

On January 19th, 1959, a three-judge federal court in *James v. Almond* held unconstitutional Virginia's automatic school closing law, under which the schools in Norfolk, Charlottesville and Warren County has been closed during the fall of 1958, saying:

"While the State of Virginia, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise in the management of such a school system, no one public school or grade in Virginia may be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the state permits other public schools or grades to remain open at the expense of the taxpayer. * * * We do not suggest that, aside from the Constitution

of Virginia, the state must maintain a public school system. That is a matter for State determination. * * *

"In the event the State of Virginia withdraws from the business of educating its children, and the local governing bodies assume this responsibility, the same principles with respect to equal protection of laws would be controlling as to that particular county or city. * * * Such schemes or devices looking to the cutoff of funds for schools or grades affected by the mixing of races, or the closing or elimination of specific grades in such schools, are evasive tactics which have no standing under the law."

On the same day the Supreme Court of Appeals of Virginia in *Harrison v. Day*, 200 Va. 439, also held Virginia's automatic school closing law and fund cutoff law invalid under the *Constitution of Virginia*. The Court further recognized the Brown case by stating that our public schools must operate even though integrated.

These decisions clearly demonstrate the position in which Virginia now finds herself after years of litigation.

Regardless of how unsound we may regard the Brown decision of the Supreme Court of the United States and irrespective of what action may be taken in the future to convince that Court, the Congress, or the people of the United States that the decision should be reversed, we are now compelled to recognize the existence of that decision and the overwhelming power of the Federal Government by the use of force to carry out Federal Court decrees.

THE OBJECTIVE

The Commission has received more than five hundred petitions signed by over twenty-five thousand people from every section of the State stating that they are "wholeheartedly opposed to the mixing of the races in our schools and will not countenance such 'mixing' and urging this Commission, the General Assembly and Your Excellency 'to restore to us the enjoyment of Virginia's honor and sovereign State's rights and rapidly to put Virginia back into the enviable position of no integration'".

The Commission is opposed to integration and offers the program set out herein because it thinks it is the best that can be devised at this time to avoid integration and preserve our

public schools. If anyone suggests at any time in the future a better plan it will be welcomed and supported with all vigor at our command.

The Commission is of the opinion that it would be necessary to close all public schools throughout the State in order to prevent any integration.

The culture and the economy of our State are directly geared to the educational attainments of our people. Steady progress has been made in raising our standards of education. We cannot afford to let those standards be lowered. Virginia is largely dependent upon the public schools for the education of her children.

The problem created by the Brown decision varies greatly in the different sections of the State. Therefore, as much autonomy as possible must be placed in the localities of the State so that no child will be compelled to attend a mixed school and so that the people will be assured the greatest possible freedom of choice in securing educational opportunities for their children.

In the following sections of this report, there are set forth the matters considered by the Commission and its recommendations for legislative action.

THE VIRGINIA CONSTITUTION

The Commission, in considering whether to recommend any change in the provisions of the Virginia Constitution, has done so with the belief that any locality which finds itself in an intolerable situation with respect to its public schools should be permitted to turn to other methods of providing educational opportunities for its children.

There is confusion as to what our State Constitution requires with respect to public schools. It is important to set forth both what is and what is not required.

While some language of our Supreme Court of Appeals in the recent case of *Harrison v. Day* may be subject to a different interpretation, the Commission acting upon the advice of counsel for the Commission, the Attorney General, and their assistants, states the following conclusions in complete confidence of their correctness. It is satisfied that these conclusions will be upheld by our court should the question be presented to it.

Sections 129 to 142, inclusive, constituting

Article IX, and a portion of Section 173, have to do with public education.

Section 129 reads: "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." However, the system of "public free schools" required by this mandate consists of only the public schools of the "primary and grammar grades" mentioned in Section 135. Our Constitution does not require the General Assembly to establish or maintain high schools.

Section 135 requires the General Assembly to make three appropriations: (1) the interest on the Literary Fund, (2) the State's two-thirds of the \$1.50 capitation tax and (3) an amount equal to the total that would be received from an annual tax on property of not less than one mill on the dollar. These funds are for the schools of the "primary and grammar grades", and are apportioned on the basis of school population. For the year 1957-58 the total of these minimum constitutional appropriations was approximately \$9,000,000.

Section 135 also provides: "And the General Assembly shall make such other appropriations for school purposes as it may deem best, to be apportioned on a basis to be provided by law." Thus it is clear that any appropriation above the constitutional minimum is entirely within the discretion of the General Assembly.

The Constitution does not require localities to levy any taxes or to appropriate any money for public schools, not even those of the primary and grammar grades. Under Section 136 it is optional with the local authorities. The General Assembly has no authority to require the localities to provide any financial support for public schools.

For the year 1957-58 the total spent for the operation of all public schools in Virginia, exclusive of debt service and capital outlay, was \$163,370,000. This consisted of \$65,250,000 from the State, \$12,000,000 from the federal government and \$86,120,000 from the localities. This was eighteen times as much as the mandatory requirements of the Virginia Constitution.

[No Need to Amend]

Thus, from a financial standpoint, the constitutional provisions are not as important as many believe. Unless it is the desire of the people of Virginia to abandon completely the

state-wide public school system, there is no need for an amendment to the Constitution.

Within the existing constitutional framework two approaches are available. The State, itself, could limit its appropriation for public schools to the bare minimum specified by Section 135 of the Constitution, that is to say, approximately nine million dollars. If this were done and the balance of funds otherwise available for school purposes were appropriated for distribution to the localities on a population basis or other equitable formula either for educational purposes generally or for general governmental purposes, a locality could go out of the public school business (except to the extent of its proportionate share of the nine million dollars) merely by not making any local appropriation for public schools. It could use its funds and the funds received from the State for the purpose of providing scholarships for its children to attend nonsectarian private schools.

Such an approach would in policy and theory be as drastic as repealing Article IX. It would amount to an abandonment of our "State system" of public free schools. The State would reduce its support for public schools by ninety percent and the statewide system would consist only of those primary and grammar grades that could be maintained with nine million dollars.

Before such a drastic approach is adopted, it is the Commission's belief that the localities should avail themselves of all possible means of meeting the situation by exercising the authority they now have, or which may properly be given to them, without completely disrupting public education throughout Virginia.

Under Section 136 of the Constitution no locality is required to appropriate funds for the support of public schools. Traditionally, and under the present Appropriation Act, funds for school purposes above the constitutional minimum are distributed only to those localities which, themselves, contribute to the support of public schools. Therefore, under the present Appropriation Act, localities which elect not to make a levy or appropriate funds for school purposes will effectively end public schools in that locality. Its share of funds appropriated by the State to meet the constitutional minimum would still have to be expended for maintenance and for the primary and grammar grades, but the extent of instruction that could be provided would be limited.

Either of the two approaches provides the de-

sired result of permitting local determination as to the operation of public schools. However, the first method effectively destroys our State system of public free schools. The locality would be free to determine the use of all state appropriations above the constitutional minimum. There would be little or no State control. The second method keeps the State system intact except in localities which refuse to support their schools. For that reason and because it requires no amendment to the Appropriation Act, the latter approach is recommended. The Commission is making certain recommendations for legislation that would give localities greater freedom of action in handling their budgetary and tax levying procedures to accomplish the desired result.

[Repeal Considered]

Serious consideration was given to the possibility of an outright repeal of Section 129 of the Constitution to meet the decision of our Supreme Court of Appeals in *Harrison v. Day*, and thus remove the mandate to maintain a system of public schools "throughout the State".

However, without the repeal of other sections of Article IX of the Constitution and of that portion of Section 173 requiring one dollar of the State capitation tax to be applied exclusively in aid of public schools, the State would still have to maintain a school system throughout the State to the extent of approximately nine million dollars. As pointed out, this constitutional appropriation is required by Section 135.

This approach would accomplish no more than can now be accomplished by simple budgetary and appropriation measures.

The Commission rejected a proposal that an election be held to submit to the electors of the State, the question, "Shall there be a convention to revise, amend or repeal Article IX and to revise Section 173 by deleting therefrom the reference to the use of State capitation taxes for public free schools?" After full debate, a majority decided that this proposal should not be submitted, not only because it does not believe an amendment is necessary at this time, but also because it believes the people should be told what the convention is expected to accomplish. Under the proposal the convention would be restricted to considering Article IX and Section 173, but it would not be restricted as to what it could do to Article IX. It could make it bet-

ter or worse; it could abolish all authority to operate schools or it could require the maintenance of all schools including high schools, depending on the composition of the convention.

The Commission also considered the advisability of amending the Constitution by inserting a new section to permit a locality to withdraw from the State public school system. For legal reasons, this approach was abandoned.

The most defensible position legally would be for the State to go *completely* out of the school business as a State function leaving it to each locality to operate public schools or not as it sees fit with funds raised from local tax sources and funds received from the State for general governmental purposes. In that way there would be complete "local autonomy" and the operation or non-operation of public schools would be a matter for the people of each political subdivision to decide. The abandonment of such a local system by local action would present no question of discrimination among the people of the political subdivision involved. The Constitution could be amended to provide for local autonomy, but this should not be done unless it is decided to abolish the state system of public free schools and set up 120-odd local systems with little or no state control.

[Could Prohibit Constitutionally]

Another approach to an amendment of the Constitution, and one which would undoubtedly prevent any integration anywhere in Virginia, would be to repeal all constitutional provisions dealing with public education and insert in lieu thereof an *outright absolute constitutional prohibition* against the expenditure of any public funds, either state or local, for the operation of public schools. For reasons previously stated, this course was rejected.

Before discussing the last approach which the Commission considered, it is necessary to state the two narrow limits to which Virginia is confined if there is to be any public education:

1. Virginia can elect to continue its "State system" of public schools, but if it does, the system must be operated in every locality. True, it can be a nine million dollar system with additional funds going to the localities on a matching or reimbursement basis or for educational purposes generally or for general governmental purposes. While that

nine million dollar system must operate everywhere, under our present Constitution anything more must meet the approval of first the General Assembly and then the locality.

2. Virginia can elect to abolish its "State system" and have "Local Autonomy" in its place. It has been seen that this means 120-odd local systems with little or no State control.

The final suggestion considered by the Commission is that all constitutional provisions concerning schools be repealed and that there be inserted in their place the simple statement "The General Assembly may make laws concerning education and may make appropriations therefor".

There are only three choices open to Virginia: (1) no public education; (2) a "State system", and (3) "local autonomy". We already have a "State system"; consequently, any change would necessarily be for the purpose of having no schools or of permitting "local autonomy". We believe that the electorate has complete confidence in the General Assembly to make the proper choice. However, where the choice is limited to one of two courses, the Commission believes that, if the people are to be asked to vote on this issue, they are entitled to know which course is intended and to have it written into our Constitution.

All things considered, the Commission recommends that we retain our "State system" for the present with the power in each locality, where the situation demands, to limit that system to that locality's share of the nine million dollars. This recommendation requires no constitutional amendment.

LOCAL BUDGETS AND APPROPRIATIONS

It is recommended that a number of changes be made in the existing laws relating to local budgets, tax levies, appropriations, and school funds so as to give the tax levying body of each county, city, or town full control over local expenditures.

The provisions of the Code relating to budgets were first enacted into law in 1926. Prior to that year there were no general provisions requiring any type of budget by counties, cities, or towns. Under the existing law the adopted budget has

come to be considered as an annual appropriation ordinance.

The budgetary procedures of local governments should be similar to that of the State. Local officers and department heads should submit an estimate of the money they need to operate their office or department. An annual budget should be prepared and published for informative and fiscal planning purposes only, and the budget should never be adopted or approved. No money collected from a general levy would be considered available, allocated, or expended for any purpose until there is first an appropriation for the purpose by the governing body. Appropriations could be made in the discretion of the governing body, annually, semi-annually, quarterly, or monthly.

It is now required, with the exception of certain specific localities, that the local tax levy must be fixed not later than the last day of May. It is recommended that this be changed to permit any locality to fix its annual levy as late as the last day of June. Three bills to carry out these recommended changes are included in the appendix to this report.

There is no State or Federal constitutional requirement that a county, city, or town raise or appropriate any money for public schools. The elected representatives of the people of any locality should be able to control and manage their local affairs in keeping with the wishes of the people. The Constitution of Virginia gives each locality the right to decide whether or not local funds will be raised or appropriated for schools. Every recommendation of the Commission is in furtherance of this right of the locality.

[Change in Language Urged]

The Commission recommends that each reference in Title 22 to school fund or funds be changed to "funds made available to the school board for public schools". Funds made available to the school board for public schools could be derived from these sources: a special local school levy; appropriations for public schools by the governing body; and, State and Federal funds which are paid to the locality specifically designated for public school purposes.

It is recommended that the division superintendents of schools be required to submit the estimate of funds deemed to be needed by the school board in two ways. The first would be an

estimate of money deemed to be needed during the next scholastic year for the support of public schools of the county or city. The second would be an alternative estimate of the amount of money deemed to be needed for educational purposes.

If these recommendations are adopted the governing body will have a wide latitude and may appropriate funds on the basis of the estimate of money deemed to be needed for public schools, or on the basis of the estimate of money deemed to be needed for educational purposes, or on the basis of a combination of the two. A bill to carry out these recommended amendments to the provisions of the Code relating to local funds for education is attached to this report as an appendix.

SURPLUS PROPERTY

Broad statutory provisions exist empowering local school boards to sell school property with all sales to be approved by the local court of record. These provisions, first enacted in 1887, are found in §§ 22-161 and 15-692 of the Code of Virginia. These two statutes should not be changed. The problem of disposal of school property will differ in each locality and with each parcel of property. Local school boards and courts can make realistic determinations as to when specific parcels of school property should be sold.

The Commission recommends the passage of an additional act which would permit the qualified voters to petition the court of record for their county, city, or town to order a referendum to be held to determine if the specific school property or properties, personal, real, or both, is any longer needed for public purposes. If a majority of the voters voting in such referendum find that a specific parcel of property is no longer needed, the property shall be sold by the school board under the applicable provisions of law. A bill to carry out this recommendation is included in the appendix to this report.

A loan made from the Literary Fund constitutes a specific lien on the school building for which such loan was made. There is no constitutional or statutory provision prohibiting the sale, subject to the lien, of school property on which there is an outstanding lien in favor of the Literary Fund.

No statutory standards or tables of minimum

sale prices for property no longer needed for public purposes exist or should exist. The local school board must be relied upon to obtain the highest possible sale price for the property and a court would not approve a sale unless it appeared that it was made for the highest responsible bid or offer. School property may be sold on terms with deferred payments for the purchase price secured by a lien on the property if the court approving the sale finds that making the sale upon terms is for the best interest and benefit of the locality and is not for the purpose of aiding or benefiting the purchaser. The court approving a sale on terms must take into consideration the provisions of § 185 of the Constitution and find that the sale transaction then before the court does not constitute a violation of that section.

ENROLLMENTS AND TRANSFERS

As part of the total program, the Commission recommends the bill, found in the appendix to this report, which would require the State Board of Education to adopt rules and regulations for use of local school boards in making the initial placement of pupils in the public schools. The bill also creates a State Placement Board of Appeals to review the placement of pupils, with appeals therefrom to the state courts.

In this connection, the Commission further recommends an additional appropriation to the State Department of Education for the purpose of completing a uniform testing program for use in the public schools as required by § 22-240.1 of the Code. An amendment to Item 131 of the Appropriation Act is found in the bill to amend same.

TEACHER STATUS

The Virginia Supplemental Retirement Act was amended in 1956 to provide that any corporation organized after December 29, 1956, for the purpose of providing elementary or secondary education may, under certain conditions, elect to have teachers employed by it become eligible to participate in the state retirement system. The Commission was informed that this 1956 amendment is now functioning in a satisfactory manner and is apparently accomplishing the purpose for which it was enacted. It is therefore the conclusion of the Commission that no legislation in this field is necessary.

§ 22-207 of the Code, as amended, requires written contracts with teachers in a form to be prescribed by the Superintendent of Public Instruction. Paragraph 7 of all such contracts provides that a school board may cancel the contract after thirty days notice whenever "the services of such teacher are no longer needed due to a lack of funds, a decrease in enrollment or attendance of pupils in the school to which said teacher has been assigned." Upon consideration of the conditions prevailing today, the Commission concludes that the 30-day clause should remain in teacher contracts and that no additional legislation is necessary toward this end.

Item 132 of the Appropriation Act of 1958 appropriates a certain sum for teacher education and teaching scholarships in aid of the public school system. The present laws and the rules and regulations promulgated thereunder permit recipients of teacher loans to repay them by teaching for a stipulated period in the public schools. It is recommended by the Commission that teachers receiving loans out of funds appropriated under Item 132 of the Appropriation Act be permitted to repay them by teaching in a nonsectarian private school approved for that purpose by the State Board of Education. A bill carrying out this recommendation is included in the appendix to this report.

MINIMUM NUMBER OF PUPILS NECESSARY TO MAINTAIN A PUBLIC SCHOOL

§ 22-6 of the Code directs the State Board of Education to prescribe by regulation the minimum number of pupils required in order to form or maintain a public school. The minimum standards are:

"Schools of one teacher, average daily attendance of twenty-five (25);

Schools of two teachers, average daily attendance of fifty (50);

Schools of three teachers, average daily attendance of seventy-five (75);

Schools of four or more teachers, average daily attendance of thirty (30) per teacher."

Certain exceptions are made for the operation of one-room schools for fifteen and sometimes ten children of school age.

In view of the above, it is the conclusion of the Commission that no further legislation is

needed for the purpose of regulating the number of pupils necessary to form and maintain a public school.

COMPULSORY ATTENDANCE

The Commission recommends for consideration of Your Excellency the bill included in the appendix which provides for "local option" in dealing with the compulsory attendance of pupils upon the public schools.

The first twenty-three sections of the proposed bill are substantially the same as former §§ 22-251 through 22-274 of the Code, all of which were repealed by the current session of the General Assembly. However, the provisions of §§ 22-253.1 and 22-253.2 are omitted.

The bill provides that any child may, with consent of his parent or guardian, be excused from school either on recommendation of the school authorities and the juvenile judge or on recommendation of the Superintendent of Public Instruction.

It also provides that its provisions shall not be in force in any locality until it has been recommended by the local school board and then duly adopted by the governing body of the locality. The operation of the bill may be suspended at any time in the same manner as local ordinances are repealed.

If any section or part thereof, is declared unconstitutional, the remainder of the bill becomes inoperative.

EXTRACURRICULAR AND SOCIAL ACTIVITIES

In studying this matter, the Commission was appalled over the extent to which extracurricular and social activities have grown and developed throughout our public school system. Undoubtedly, in some instances, this multitude of activity has reached the point where it is beginning to supplant and impair fundamental learning.

The effectiveness of the present curriculum in the public schools is directly related to extracurricular activities in the public schools and it is felt that the Commission on Public Education created in 1958 by S.J.R. No. 14 will thoroughly study the problems above mentioned.

Until that Commission reports it is believed that the problems may be handled by the State Board of Education.

TRANSPORTATION

The Commission has also drafted for your consideration a bill to provide for the transportation of children to nonsectarian private schools or in lieu thereof to provide transportation grants in amounts approved by the State Board of Education. It may be found in the appendix of this report.

SCHOLARSHIPS AND AID TO EDUCATION GENERALLY

The Commission recommends that the program of State and local aid to children securing their education in nonsectarian private schools be broadened to provide scholarships to all children entitled to attend the public free schools who prefer to secure their education in private schools rather than public schools.

In the appendix to this report is a proposed bill which the Commission recommends be adopted to accomplish this purpose. The bill, if enacted into law, would provide for each child a minimum scholarship of \$250.00, the actual cost of tuition at the school attended, or an amount equal to the total cost, excluding debt service and capital outlay, per pupil in average daily attendance, of operating the public schools in the locality making the scholarship grant, whichever of such three sums is the lowest. The State and localities would participate jointly in providing such scholarship, each locality's share of each scholarship to be the same percentage as is its contribution to the cost of operating the public schools. The funds for the scholarship would be disbursed by the localities under rules and regulations promulgated by the State Board of Education.

The Commission also recommends that the tuition that one locality may charge for attendance at its public school by a child residing in another locality in Virginia be limited to the total per capita cost of education, excluding debt service and capital outlay, of the public schools of the locality to which such child is admitted. A proposed bill to amend Section 22-219 of the Code to accomplish this purpose is contained in the appendix of this report.

In order to prevent road blocks being placed in the path of those attempting to organize and establish private schools in the form of numerous inspections of buildings sought to be used for such schools and requiring unnecessary remedial steps before the issuance of a use permit for the

desired purpose, your Commission believes that legislation is necessary. Included in the appendix to this report is a proposed bill which provides that where a private school has secured a permit issued by the State Board of Education with the approval of the State Fire Marshal, to use an existing building for the operation of a school it will not be subject to local zoning ordinances, plumbing or building codes, etc. Such permits would be for a period of one year, subject to extension for one additional year, after which time the operation would be subject to local regulations. The Commission recommends the adoption of such a bill.

PUPIL PREFERENCE PLAN

This Commission has given consideration to the possibilities of a Pupil Preference Plan under which, in addition to the operation of public schools open to the admission of children of both races, public schools would be operated for the children of each race whose parents object to sending their children to mixed schools.

The pupil preference plan, or the three school plan as it is sometimes called, if it could be successfully defended in the courts, has some attractive features. It has the advantage of being based upon the principal of freedom of choice and would, if approved, avoid enforced integration. Under it, the State would maintain the right to operate segregated schools for those who desire them. It would present practical difficulties in administration in some localities.

The plan has uncertainties from a legal standpoint. In a weakly defended case which arose in an unfavorable situation, such a plan was declared invalid by a Federal District Court in Tennessee. The case was not appealed. There is language in the decision of the Supreme Court of the United States in *Aaron v. Cooper* which casts doubt upon its legality.

However, there are those who feel that such a plan should be adopted as a new line of defense and vigorously defended all the way to the Supreme Court in the hope that the principle of freedom of choice would be upheld or in the hope that further support for our position would be obtained throughout the nation should the court strike down such principle and disclose that it is pursuing a course that would compel the intermingling of the races.

To be upheld, such a plan probably should be tested in a situation where there is at least

some measure of integration and not in a situation which results in fact in a two school system which is fully segregated.

Due to the practical difficulties in establishing a three school system in many localities the Commission does not recommend the adoption of any pupil preference plan at this time.

REPEAL OF LAWS

It is recommended that the following Sections of the Code pertaining to local budgets and appropriations, be repealed: 15-582, 22-121, 22-122, 22-123, 22-125, 22-127.1, 22-129, 22-131, 22-139 and 22-139.1. This recommendation is carried out in bills previously discussed in this report and found in the appendix.

Since a new enrollment bill is recommended, Sections 22-232.1 through 22-232.17, which created a State Pupil Placement Board, should be repealed. This is done in the enrollment bill found in the appendix.

Sections 22-115.1 through 22-115.20 and Chapter 56, Acts of Assembly, Extra Session, 1956, are repealed in the recommended bill for pupil scholarships since they are in conflict therewith. Sections 22-194 and 22-186 are repealed in the same bill. They deal with the charge of tuition in public high schools and are unnecessary because of Section 22-219 of the Code.

The decision of *Harrison v. Day* rendered the following Sections of the Code inoperative:

1. Sections 22-188.3 through 22-188.15, commonly known as the school closing statutes;
2. Sections 22-188.30 through 22-188.40, pertaining to state-established school systems in school divisions where an emergency exists;
3. Sections 22-188.41 through 22-188.49, generally known as the Little Rock bills;

A bill is found in the appendix to this report which repeals the aforesaid sections.

The Commission also recommends for consideration a bill, found in appendix to this report, which permits a locality to close its public schools whenever federal military forces are deployed in connection with the operation thereof.

CONCLUSION

Many uncertainties surround the operation of public schools due to the attempt to force the

mixing of the races therein. In view of the difficulties in appraising the extent of such efforts and the extent to which the federal courts will go in supporting what appears to be a deliberate drive to change the customs and social structure of our people, the Commission believes that action at this time should be limited to that recommended herein.

Due to the limitations of time your Commission is not prepared to report to this session of the General Assembly whether any adjustments in our tax structure are required. It is recommended that this study be continued for report by the next regular session.

The Commission should also continue its study to determine whether the Constitution should be amended to provide for local autonomy or otherwise.

The Commission wishes to recognize the contribution that public school teachers generally are making in these uncertain days. Included in the appendix is a proposed House Joint Resolution commending these public school teachers. The Commission recommends the adoption of such resolution by the General Assembly.

Respectfully submitted,

Mosby G. Perrow, Jr., Harry B. Davis, Howard H. Adams, Fitzgerald Bemiss, Edw. L. Breeden, Jr., Robert Y. Button, Curry Carter, Geo. M. Cochran, John A. K. Donovan, Charles R. Fenwick, Earl A. Fitzpatrick, Kossen Gregory, Robert R. Gwathmey, III, Lawrence H. Hoover, S. F. Landreth, W. T. Leary, M. M. Long, Harrison Mann, W. M. Minter, Willard J. Moody, Garnett S. Moore, W. Tayloe Murphy, Fred G. Pollard, James W. Roberts, V. C. Smith, Harry C. Stuart, H. Ray Webber, Hunt M. Whitehead, Robert Whitehead, Edward E. Willey, Joseph J. Williams, Jr.

• • •

CONCURRING STATEMENT

I subscribe to the principle embodied in the Minority Report, but it does not point out a defense against the evils it deplors. On the other hand, the Majority Report, in its attempt to defeat integration, concedes that some integration is inevitable; this I am unwilling to concede.

Believing, as I do, that the Majority Report

points a way in some measure to contain integration, I sign it, because no better plan has been evolved or suggested.

Curry Carter.

• • •

CONCURRING STATEMENT

I agree with most of the recommendations contained in the majority report. I disagree with some of them particularly with the portion of the report which recommends that no action be taken at this time to amend Article IX and Section 173 of the Constitution of Virginia. I am signing the majority report with this statement of my position. I think amendment of the sections of the Constitution mentioned is necessary to provide complete local autonomy in the operation of schools.

W. M. Minter.

• • •

CONCURRING STATEMENT

I am entirely opposed to integration in all its forms and I am signing the majority report because it is the best we can do at the present time.

I would be a poor representative indeed, if I were not to respect the wishes of the vast majority of the people of Pittsylvania County, I therefore, reserve the right to vote for and work for any bills or resolutions introduced in the General Assembly of Virginia to repeal or amend Article IX of the Constitution of Virginia.

Hunt M. Whitehead.

• • •

STATEMENT OF ROBERT Y. BUTTON

I am in agreement with many recommendations of this report and will support them. Therefore, I am signing the report.

However, I am in disagreement with the majority of the Commission in other recommendations contained therein, particularly with that portion of the report dealing with the re-enactment of a Compulsory School Attendance Law at this time, and with the majority's approach to the question of amendment of Article IX of our Constitution. My votes in the Commission on these recommendations were contrary to the majority view as expressed in this report, and I feel at liberty to continue to vote against these recommendations.

Robert Y. Button.

• • •

STATEMENT OF MESSRS. GWATHMEY MOODY AND LEARY

Taking note of the problems pointed out in the majority report of the Commission and recognizing that public support of education in most sections of Virginia should continue and will continue, but further recognizing that in some areas of Virginia the localities and the people may desire and need more resources to deal with the problem than are contained in the recommendations of the majority of the Commission, we feel that the Commission should at this time recommend a complete revision of Article IX and § 173 of the Constitution of Virginia so as to provide total local autonomy in education in Virginia. The report of the majority states that the "most defensible position legally would be for the State to go *completely* out of the school business as a State function leaving it to each locality to operate public schools or not as it sees fit with funds raised from local tax sources and funds received from the State for general governmental purposes." If this is the strongest legal position, we should adopt it now. Short of such revision, the recommendations contained in the report of the majority of the members of the Commission are the best and strongest possible to handle the problems confronting public supported education in Virginia.

Robert R. Gwathmey, III
Willard J. Moody
Wilbur T. Leary

DISSENTING STATEMENT

I find that my views differ substantially from the majority of the members of the Perrow Commission, and for that reason must state why I cannot concur in the majority report.

I acknowledge that the General Assembly can only help the people of Virginia in very limited ways to preserve segregation and uphold the principle of State's Rights. One of these means involves the use of the state police powers in the hands of the Governor. The other involves constitutional changes which would permit the State to close schools that are integrated.

It is apparent, I believe, to every member of the Perrow Commission that Virginia can take no action to preserve segregation without substantially altering Article 9 of the Constitution. There are those who believe that this is not the time to propose such a referendum, and the Com-

mission indicated that result when it voted 22-16 against submitting this question to the people on a referendum. For my part, I am wholly willing to abide by that result. Certainly, no referendum should be put to the people of Virginia when there is a clear indication that the Governor of Virginia would not support such a referendum and that a substantial number of the members of the General Assembly are unwilling to support that program at this time.

The only alternative which offered a hope of segregation was a return to a massive resistance program, fully exercising the police powers of this state. The Governor of Virginia refused to exercise those powers under the Harrison-Minter Bill which was enacted prior to his inauguration and amended during the first session of the General Assembly under his administration. He used his office to defeat such a program when it was offered in the early part of this current special session. Quite obviously, it is useless for the General Assembly to enact any measure which would not be enforced by an Executive who does not believe the General Assembly can give him such powers.

[Broad Policy Decision Basic]

After discarding both theories under which segregation might be maintained, the Commission considered a policy of contained integration. Once a decision was reached on the broad policy, the Commission could take no other course than to assume that it could only make integration as difficult as possible. Even within the policy of contained integration, however, we have, in my opinion, weakened the constitutional position of Virginia by placing our whole program on a local option basis. This makes mass integration in some areas a real possibility on the local level. It does, however, offer some hope of the maintenance of segregation in certain Southside Virginia counties. It offers only a slow strangulation in other areas like Alexandria, which will not give up their public schools, yet wish to offer their people some other recourse than integration.

Several measures have my wholehearted support. The first of these are those amendments recommended by the majority opinion to permit local appropriations, or, in the alternative, to permit a locality to withhold the local appropriations. I likewise cannot differ with the amendments dealing with surplus property. I also

concur with the majority in its report on the teacher status and other related matters. Only the compulsory school attendance law recommended by the Commission is excepted from that report, on which I will comment later.

Two other matters, however, must deserve special mention. The Pupil Placement Act recommended by the Commission carries two appeals features. The local school board will make the initial assignments hereafter. The individual will have the right of appeal to a State Pupil Placement Board, and from there to the State Courts. I recognize, as does the majority of the Commission, that the chances of requiring appeals to the State courts is nil; that language is merely surplusage in the bill. What really concerns me, however, is the fact that the appeals board may be bypassed by the Federal courts and the decision of the local board for the purposes of the federal courts will be a final decision. The Perrow Commission has, in effect, recommended to the people of Virginia a local assignment plan, despite the fact that the Governor of Virginia and the Attorney General have time and again said that a local assignment plan is a natural conduit for integration.

The tuition grant program offered by the Commission may be helpful and even desirable in certain areas of this state. It cannot, however, be of any real service in Alexandria. It is designed to offer a \$250 grant to our people, but this sum will not be paid by the state as required under the present law. It will require approximately \$177 to be appropriated by the locality and the balance of \$73 by the State. Private education costs in Alexandria will not be less than \$400 per person. If the grant program is to be effective, the City of Alexandria will be required to appropriate \$150 in addition to the \$177 which the law now requires. This \$327 will place a burden on the City so heavy that it does not now seem possible. We must fully recognize that while the City must make these appropriations to the extent required by law, it will likewise be required to continue its full appropriation for public schools. The cumulative burden of both these appropriations will make it necessary to further increase taxes locally or, in the alternative, to prevent the authorization of an effective grant program.

[Grant Program Commended]

While I dissent from the report of the Committee on scholarship grants, I do wish to thank

the Committee for the two increases which they recommended above their original sum of \$50 for Alexandria. The provisions of the recommended legislation present the very best grant program I have seen. Simply as a financial matter, the grant program will not work in the metropolitan areas.

In the early part of this current special session the General Assembly repealed the compulsory school attendance law on the recommendation of the Governor, to prevent forced integration. The majority report will recommend the re-enactment of compulsory school attendance and provide that certain local authorities or the Superintendent may excuse an individual from the effects of compulsory school attendance. The compulsory school attendance law is a criminal statute, and the wisdom of providing that a public official may excuse the non-performance of what is otherwise a criminal act may well be doubted, but certain it is that compulsory integration will arise where the local authorities or the Superintendent fails to permit a child to withdraw when a school has been integrated.

Perhaps the most unfortunate aspect of the present position of Virginia is what amounts to her abandonment of the constitutional fight which she has heretofore made on the issue of State's Rights. There were days when that issue sounded the battle cry for Virginia and the South. The matter of segregation or integration was of secondary importance. Undoubtedly there are those in Virginia who never believed in constitutional issues for which we have stood; there are others who only lent lip service to the doctrine of State's Rights and now turn their backs on this principle. But for those who still believe that we should resist and that we should maintain this fight on the basis of the constitutional principle involved, I find it necessary to record this dissent to the majority report.

Respectfully submitted,
James M. Thomson

DISSENTING REPORT

The majority report of this Commission is in keeping with a policy of containment which is an effort legally to minimize and make more difficult the process of integration in our public schools. In our judgment it affirmatively makes it legally possible for a locality to proceed with as much integration as that particular locality

desires. There is little contained in the proposals which contemplate total segregation in the public schools of this State.

We are not willing to strive simply for containment; we are not willing to accept a little or token integration. The proposals in the majority report contain much that may be found useful in a program of containment and perhaps to some extent with the appropriate constitutional changes in a program of massive resistance, although there are individual objections among us to certain thereof.

The people of Virginia, and not the General Assembly, will ultimately have to decide how massively they wish to resist integration in our public schools. In the final analysis, the people will decide between public schools with an ever increasing degree of integration or an educational system of some other type. However, the General Assembly should do everything legally possible to make available valid educational grants and scholarships at both the local and State level; and to remove and initiate the removal of all statutory and constitutional provisions which impede such a program.

We believe that the proposals in the majority report would be materially strengthened and rendered considerably more effective by an amendment to or the removal of the provisions of the Constitution of Virginia making it mandatory for the General Assembly to establish and maintain an efficient free public school system throughout the State; and that to pursue any broader program of resistance beyond the proposals of the majority report, the removal of the constitutional restrictions is imperative.

[Power to Amend Complete]

In Virginia the people have the power to amend our State Constitution as they may see fit. They are not compelled to leave an open breach in the walls of their defense. If they be ready to revise and amend Article IX and Section 173 of our Constitution so as to leave to the General Assembly the power to adopt such legislation from time to time as in these changing times may be necessary to protect us, then in keeping with our own law, we can refuse to support any integrated school and provide for educational and tuition grants without restriction.

The undersigned believe that resistance short of this may be futile.

The question is, are the people of Virginia

ready to make the necessary amendments to the Constitution and continue a program of massive resistance? So far as we are concerned, we are ready. We believe the people of Virginia, if these complicated issues be fully explained, will also be ready and anxious so to proceed. We recognize, however, that unless substantial majorities in both Houses of the General Assembly together with the Administration and other political leaders of the State are ready to vigorously further such a program, we cannot hope to obtain now the degree of unanimity among our people which so stern a course of procedure requires. It is obvious from the expressions already made by the majority on this Commission that such support is not forthcoming at this time, and accordingly we will not further pursue the matter for the present. It is our opinion that in the near future, sooner perhaps than many realize, the people of Virginia will demand that the General Assembly initiate this course of action and thereby enable them to remove the constitutional shackles now upon us.

The majority report acknowledges the superior power of the federal courts and that no locality will be able to place the State and her sovereign power between it and the federal court. Every locality will be without any legal weapon to prevent court-ordered integration.

The undersigned believe that Virginia should not surrender her right to conduct her own schools and internal affairs. We do not feel that we should yield to the reckless threat of federal judicial tyranny and power without further and more determined resistance. The General Assembly has spoken on more than one occasion, as recently as January 31, 1959, against the unwarranted usurpation of power by the Federal Courts, and we ought now to assert our inherent rights as the free people of a sovereign State.

[Must Not Surrender]

We must not now meekly surrender. We should now exercise every resource at our command, and use all the sovereign powers of Virginia, as may be necessary, to resist this illegal encroachment upon our constitutional rights which have been so flagrantly trespassed upon by the Supreme Court of the United States and certain lesser federal courts.

We, too, wish to commend the teachers in our public schools. The circumstances of the times

have forced them to be the victims of uncertainty and doubt as to what the future might bring. Despite this, they have kept at their task. The position stated by us in the earlier portion of this report has been designed in part to help these devoted people. For it is our view that we can shortly expect suits in the federal courts to compel local school boards to employ Negro teachers in integrated schools. The desire of the majority of the federal courts to compel integration can then be expected to result in the displacement from the public school system of many white teachers. To seek to avoid this, as well as the other results of integration, we have stated the above views.

For the reasons above stated, we are not in agreement with the general policy embraced in the majority report and must respectfully reserve the right to support any proper proposal, whether emanating from us, or any other member of the General Assembly which has for its purpose the non-mixing of the races in our schools.

Respectfully submitted,

Mills E. Godwin, Jr., C. Stuart Wheatley, James M. Thomson, J. D. Hagood, J. C. Hutcheson, Russell M. Carneal, J. H. Daniel, Edward O. McCue, Jr., Garland Gray.

Titles for Proposed Acts

A BILL to amend and reenact §§ 15-288, 15-320, 15-353, 15-370, 15-395, 15-551.3, 15-575, 15-576, 15-577, 15-584 and 15-585 of the Code of Virginia, relating to duties of the director of finance, county manager, or executive secretary in certain counties, to application of moneys of cities and towns, to the duties of executive secretaries for counties, and to budgets of counties, cities, and towns, to provide budget shall be for informative and fiscal planning purposes only, to provide no moneys shall be available to be paid out for any contemplated expenditures unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditures, to require certain estimates of financial needs be submitted to governing bodies, to change the time for publishing and holding hearings on the budget, and to repeal § 15-582 of the Code of Virginia, relating to notice of tax increase before any local tax levy shall be increased.

A BILL to amend and reenact §§ 22-55, 22-60 as amended, 22-72 as amended, 22-73, 22-78, 22-97 as amended, 22-124, 22-126 as amended, 22-127 as amended, 22-128 as amended, 22-130, 22-132, 22-133 and 22-141 as amended, of the Code of Virginia, relating to management and control of funds made available to school boards, auditing and approving claims and issuing warrants by school boards, levies and appropriations for school purposes, including capital expenditures, indebtedness, and rents, custody and disbursement of local school

funds, and town school districts' share of county school funds, to provide claims against, warrants issued by, and disbursements on behalf of the school board of a county, city, or town shall only be payable out of funds made available to the school board, to provide for the appropriation of funds for public school and for educational purpose, annually, semi-annually, quarterly, or monthly, which shall not be decreased in an appropriation period except under certain conditions, the levying of taxes for public school purposes by counties, cities, and towns, including for capital expenditures, indebtednesses, and rents; to add to the Code of Virginia new Sections numbered 22-120.3, 22-120.4, and 22-120.5 to provide the superintendent shall prepare and submit with the approval of the school board an estimate of the amount of money deemed to be needed for public schools and in the alternative an estimate of the money deemed to be needed for educational purposes, the inclusion of such estimates in the county budget for informative and fiscal planning purposes only, the request for funds for public schools and for educational purposes; to repeal §§ 22-121, 22-122, 22-123, 22-125, 22-127.1, 22-129, 22-131, 22-139, and 22-139.1 of the Code of Virginia, and all amendments thereof, relating to budgets, estimates, and requests for funds needed for school purposes, to referendum in a county, city, or town in event the governing body refuses to lay such levy or make such appropriation as is requested by the division superintendent, the cessation of expenditures

on local school funds on direction of the governing body, town levies for school purposes, assessment of taxes of public school purposes, apportionment of state school funds, and additional funds for school purposes from local school taxes.

A BILL to amend and reenact §§ 58-839 and 58-844 of the Code of Virginia, relating to the fixing and making of county, city, town, and district levies by governing bodies; to provide that such levies shall be fixed or made not later than a regular or called meeting in June; and to provide that no funds collected from general levies shall be considered available, allocated, or expended for any purpose until there has been an appropriation of funds for that purpose by the governing body; and to add § 58-846.1 to the Code of Virginia, to provide that notice shall be given before any local tax levy shall be increased in any county, city, town or district.

A BILL to amend and reenact §§ 58-921, 58-925, and 58-928 of the Code of Virginia, relating to the payment of warrants and the settlement of accounts by county treasurers, to provide that warrants may only be paid from funds appropriated for the purpose for which the warrant was drawn, and to provide that the clerk of the governing body of the county shall deliver copies of all appropriations of funds to the treasurer of the county.

A BILL to permit a referendum to be held in any county, city or town constituting a separate school district, to determine if specific real or personal school properties are needed for public purposes, to provide when such referendum shall be held, the manner of conducting such referendum, and to provide that specific properties shall be sold if the majority of the voters voting find that the school property is no longer needed for public purposes.

A BILL to require the State Board of Education to adopt rules and regulations for the placement of pupils in the public schools; to provide that initial placement shall be made by local school boards; to provide for administrative procedure and remedies for pupils seeking enrollments; to create a Placement Board of Appeals and confer upon it powers as to place-

ment of pupils; to provide for appeals to the courts of this State; and to repeal Sections 22-232.1 through 22-232.17 of the Code of Virginia, as amended, relating to enrollment or placement of pupils.

A BILL to permit teachers to repay State scholarships by teaching in nonsectarian private schools.

A BILL to provide in certain cases and under certain circumstances for the compulsory attendance of children between the ages of seven and sixteen upon the public schools of this State and to provide penalties for violations.

A BILL to permit schools boards to provide transportation for children attending nonsectarian private schools; or in lieu thereof to allot funds to assist in paying the costs of such transportation; to provide for State assistance in the payment of costs thereof; and to provide that local governing bodies may make appropriations therefor.

A BILL to encourage the education of the children of the Commonwealth by providing scholarships for the education of such children in nonsectarian private schools and in public schools located outside of the locality in which they reside; to provide for the manner in which such scholarships shall be made available and the extent of State and local participation in the payment of such scholarships; and to make unlawful the improper obtaining or expending of funds provided for such scholarships; and to repeal Chapter 56, Acts of Assembly, Extra Session 1956, and Chapter 7.1 of Title 22 of the Code, consisting of §§ 22-115.1 through 22-115.21, relating to grants for education of children in private schools.

A BILL to amend and reenact § 3 of Chapter 642 of the Acts of Assembly of 1958, approved April 7, 1958, relating to the appropriation of the public revenue for the two years ending, respectively, on the thirtieth day of June, 1959, and the thirtieth day of June, 1960, as amended by Chapter 3 of the Acts of Assembly, Extra Session 1959, approved January 31, 1959, so as to appropriate monies from the general fund of the State

Treasury to assist localities in providing, in accordance with law, scholarships to children attending nonsectarian private schools located in or outside and public schools located outside the locality in which such children reside; and to appropriate additional monies from the general fund of the State Treasury to the Department of Education of research, planning and testing; and to appropriate monies from the general fund of the State Treasury for the administration of the duties of the Placement Board of Appeals; and to repeal the appropriation made for the year ending on the thirtieth day of June 1960 to further and encourage generally the education of the children of Virginia by providing for the payment of tuition grants; and to repeal a portion of the appropriation for the administration of the Pupil Placement Act.

• • •

A BILL to amend and reenact § 22-219, as amended, of the Code of Virginia, relating to the attendance of children residing in the State in the public schools of a county, city, or town in which such children do not reside, so as to provide that the tuition charged for attendance shall not exceed the per capita cost of education, exclusive of capital outlay and debt service; and to repeal §§ 22-194 and 22-196 of the Code, relating to tuition charges to children attending high schools.

• • •

A BILL to authorize any person, firm or corporation to use any existing building for the purpose of operating a private elementary or

high school notwithstanding the provisions of any other statute, city charter, or ordinance.

• • •

A BILL to repeal Chapter 68 of the Acts of Assembly of 1956, Extra Session, approved September 29, 1956, as amended, which was codified as §§ 22-188.3, 22-188.4, 22-188.5, 22-188.6, 22-188.7, 22-188.8, 22-188.9, 22-188.10, 22-188.11, 22-188.12, 22-188.13, 22-188.14 and 22-188.15 of the Code of Virginia, relating to the closing of schools; Chapter 69 of the Acts of Assembly of 1956, Extra Session, approved September 29, 1956, which was codified as §§ 22-188.30, 22-188.31, 22-188.32, 22-188.33, 22-188.34, 22-188.35, 22-188.36, 22-188.37, 22-188.38, 22-188.39 and 22-188.40 of the Code, relating to State established school systems; Chapter 41 of the Acts of Assembly of 1958, approved February 17, 1958, which was codified as §§ 22-188.41, 22-188.42, 22-188.43, 22-188.44 and 22-188.45; and Chapter 319 of the Acts of Assembly of 1958, approved March 13, 1958, which was codified as §§ 22-188.46, 22-188.47, 22-188.48 and 22-188.49 of the Code, relating to schools policed or disturbed under federal authority.

• • •

A BILL to authorize school boards to close the public schools in any school district whenever the orderly administration of the educational process is disrupted or disturbed because of the use of military forces or other personnel under Federal authority for the purpose of policing the operation of any school in the district or to prevent violence or disorder in such district.

EDUCATION

Public Schools—Virginia

Chapter 46 (House Bill 69) of the Acts of the 1959 Virginia General Assembly, approved April 24, 1959, authorizes county school boards to borrow, and the Board of Trustees of the Virginia Supplemental Retirement System to lend, money from the system for school construction purposes approved by the county governing body, and sets up procedures for the county school boards to follow in qualifying for and in repaying such loans.

AN ACT to amend the Code of Virginia by adding thereto in Title 15 a new chapter numbered 19.2 and new sections numbered

15-666.69 through 15-666.76, so as to authorize the school board of any county to contract to borrow money from the Virginia Supplemental

Retirement System for the purpose of school construction, with the approval of the governing body of the county; to confer certain powers upon the Board of Trustees of the Virginia Supplemental Retirement System; to provide that such indebtedness shall be evidenced by negotiable bonds of the county; to prescribe the procedure for the issuance of such bonds; to provide for the disposition of the proceeds; to provide for the payment of principal and interest; and to declare the status of such bonds.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding thereto in Title 15 a new chapter numbered 19.2 and new sections numbered 15-666.69 through 15-666.76, the new chapter and sections being as follows:

Chapter 19.2

Borrowing by County School Boards from Virginia Supplemental Retirement System

§ 15-666.69.—In conformity with section 115-a of the Constitution of Virginia, as amended by an amendment ratified in the general election in November, nineteen hundred and fifty-eight, the school board of any county is hereby authorized to contract to borrow money from the Virginia Supplemental Retirement System for the purpose of school construction, with the approval of the governing body of the county, and the Board of Trustees of the Virginia Supplemental Retirement System is hereby authorized to lend the money if it be available for investment, subject to and in conformity with the provisions of this chapter.

§ 15-666.70.—Whenever the school board of any county desires to contract with the Board of Trustees of the Virginia Supplemental Retirement System to borrow money for the purpose of school construction, it shall adopt a resolution setting forth the purpose for which it is desired to borrow the money and the amount of such proposed borrowing. Such resolution shall be entered in the minutes of the school board, and a copy of the same, certified by the clerk of the school board, shall be submitted by the

school board to the governing body of the county for its approval or rejection. If the governing body of the county approves the resolution, it shall enter in approval in its minutes, and the school board may then endeavor to negotiate an agreement with the Board of Trustees of the Virginia Supplemental Retirement System for the borrowing of such money. If agreement be reached, the question of borrowing such money on the terms agreed upon by the school board and the Board of Trustees of the Virginia Supplemental Retirement System shall again be submitted to the governing body of the county for its approval or rejection. If the governing body approves the terms of such agreement, it shall enter its approval in its minutes, and the school board may then, by resolution entered in its minutes, provide for the issuance of negotiable bonds evidencing the indebtedness for sale to the Virginia Supplemental Retirement System. Such bonds shall be issued in conformity with the provisions of this chapter.

§ 15-666.71.—Such bonds shall be issued by the school board in the name of the county. For the payment of the principal of and the interest on such bonds the full faith and credit of the county shall be pledged. The bonds shall be signed by the chairman of the school board and countersigned by the clerk thereof, but the bonds may bear or be executed with the facsimile signature of one of such officials, and in the case of coupon bonds the coupons may bear the facsimile signatures of both of such officials; the bonds shall be under the seal of the school board, but in lieu of impressing such seal physically upon such bonds, a facsimile of such seal may be imprinted on the bonds if so authorized by the school board. The bonds shall be in the denomination of one thousand dollars each; they may be in coupon or registered form, or both, as may be agreed upon by the school board and the Board of Trustees of the Virginia Supplemental Retirement System; they shall bear interest at the agreed rate or rates not exceeding six per centum per annum and such interest shall be payable semiannually; they shall be serial bonds with maturities and amounts as agreed upon

but the first maturity date shall not be longer than two years from the date of such bonds and the maximum maturity date shall not be longer than thirty years from the date of such bonds. The place or places of payment of principal and interest shall be as agreed upon by the school board and the Board of Trustees of the Virginia Supplemental Retirement System. In case any officer whose signature or a facsimile thereof shall appear on any bond or coupon shall cease to be such officer before the delivery of such bond, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he remained in office until such delivery, and any bond may bear the signature of a person who at the actual time of the execution of such bond shall be the proper officer to sign such bond although at the date of such bond such person may not have been such officer.

§ 15-666.72.—All proceeds received from the sale of the bonds issued under the provisions of this chapter shall be paid to the treasurer or chief financial officer of the county, who shall promptly deposit such funds in bank or banks as prescribed by general law. He shall account for such money through a fund, separate from all other funds, in the system of accounting.

§ 15-666.73.—Pending the application of the proceeds of any bonds issued under the provisions of this chapter of the purpose for which such bonds have been issued, all or any part of such proceeds may be invested, upon resolution of the school board, in securities that are legal investments under the laws of this State for public sinking funds, which shall mature, or which shall be subject to redemption by the holder thereof at the option of such holder, not later than twenty-four months after the date of such investment. Any security so purchased as investment of the proceeds of such bonds shall be deemed at all times to be a part of such proceeds, and the interest accruing thereon and any profit realized from such investment shall be credited to such proceeds. Any security so purchased shall be held by the treasurer or chief financial officer of the county and shall be sold by him upon resolution of the

schools board directing such sale, at the best price obtainable, or presented for redemption, whenever it shall be necessary, as determined by such resolution, so to do in order to provide moneys to meet the purpose for which the bonds shall have been issued.

§ 15-666.74.—Subject to the approval of the State Commission on Local Debt, the school board may, in case any bond thereof shall become mutilated or be destroyed or lost, cause a new bond of like date, number and tenor to be executed and delivered in exchange and substitution for and upon the cancellation of such mutilated bond and its interest coupons, if any, or in lieu of and in substitution for such bond and its coupons, if any, destroyed or lost, upon the holder's paying the reasonable expense and charges in connection therewith, and in the case of a bond destroyed or lost, his filing with the treasurer or other officer having custody of the funds from which the same is to be paid, evidence satisfactory to such treasurer or other officer that such bond and coupons, if any, were destroyed or lost, and of his ownership thereof and furnishing indemnity satisfactory to such treasurer or other officer.

§ 15-666.75.—For the payment of the principal of and the interest on any bonds issued under the provisions of this chapter, the governing body of the county is hereby authorized and required to levy and collect annually, at the same time and in the same manner as other taxes of the county are assessed, levied and collected, a tax upon all locally taxable property within the county over and above all other taxes authorized or limited by law sufficient to pay such principal and interest as the same respectively become due and payable.

§ 15-666.76.—Bonds issued under the provisions of this chapter and purchased by the Board of Trustees of the Virginia Supplemental Retirement System shall be deemed negotiable instruments under the laws of this State. Such Board of Trustees may, in its discretion, sell any such bonds so purchased and held by it at such time or times as to it may seem desirable in the management of the funds under its control;

and such bonds are hereby made securities in which all public officers and bodies of this State, and all counties, cities and towns and municipal subdivisions, all insurance companies and associations, all savings banks and savings institutions, including savings and loan associations, trust com-

panies, beneficial and benevolent associations, administrators, guardians, executors, trustees and other fiduciaries in this State may properly and legally invest funds under their control.

2. An emergency exists and this Act is in force from its passage.

EDUCATION

Public Schools—Virginia

Chapter 49 (Senate Bill 19) of the 1959 Virginia General Assembly, approved April 24, 1959, permits local school boards to provide transportation for children in nonsectarian private schools and provides that such boards in such event shall be entitled to reimbursement from state funds, or, alternatively, to allot funds within certain limitations to assist parents in paying the costs of other means of transportation. Local governing bodies are also authorized to make appropriations necessary to give effect to the Act.

AN ACT to permit school boards to provide transportation for children attending nonsectarian private schools; or in lieu thereof to allot funds to assist in paying the costs of such transportation; to provide for State assistance in the payment of costs thereof; and to provide that local governing bodies may make appropriations therefor.

Be it enacted by the General Assembly of Virginia:

1. #1. The school board of every county, city or town, if the same be a separate school district, may provide transportation for any child enrolled in and attending nonsectarian private schools and, in such event, shall be entitled to reimbursement out of State funds to the same extent as counties, cities, and towns are reimbursed for costs expended for transportation of pupils to and from public schools. Chapter 13 of Title 22 shall be applicable to such trans-

portation together with the rules and regulations of the State Board of Education adopted pursuant thereto.

#2. The school board may, in lieu of furnishing transportation authorized by the preceding section, allot funds to assist parents of children attending nonsectarian private schools in paying the cost of other means of transportation. Such assistance shall not exceed an amount approved by the State Board of Education with due regard to the cost of transporting pupils generally in the public schools throughout this State. Fifty per centum of such cost shall be paid by the school division in which the child resides and fifty per centum by the State.

#3. The governing bodies of the several counties and the councils of the several cities and towns are hereby authorized to appropriate such funds as in their judgment may be necessary to carry out the provisions of sections 1 and 2 of this Act.

EDUCATION

Public Schools—Virginia

Chapter 50 (Senate Bill 21) of the Acts of the 1959 Virginia General Assembly, approved April 24, 1959, permits any recipient of a State Board of Education scholarship who was previously allowed to discharge the obligation to repay the loan by teaching one year in state public schools, now to discharge same by teaching in an approved nonsectarian private school.

AN ACT to permit teachers to repay State scholarships by teaching in non-sectarian private schools

Be it enacted by the General Assembly of Virginia:

1. § 1. That any recipient of a scholarship from the State Board of Education, out of funds appropriated for teacher education and teaching scholarships under an agreement whereby the

obligation to repay the amount of the grant or loan may be cancelled by teaching one year in the public schools of this State, may satisfy his obligation to repay the amount of the grant or loan by teaching one year in nonsectarian private school approved by the State Board of Education.

2. An emergency exists and this act is in force from its passage.

EDUCATION

Public Schools—Virginia

Chapter 51 (Senate Bill 25) of the Acts of the 1959 Virginia General Assembly, approved April 24, 1959, provides that warrants may be paid only from funds appropriated for the purpose for which the warrant was drawn and that the clerk of the county governing body shall deliver copies of all appropriations of funds to the county treasurer.

AN ACT to amend and reenact §§ 58-921, 58-925, and 58-928 of the Code of Virginia, relating to the payment of warrants and the settlement of accounts by county treasurers, to provide that warrants may only be paid from funds appropriated for the purpose for which the warrant was drawn, and to provide that the clerk of the governing body of the county shall deliver copies of all appropriations of funds to the treasurer of the county.

Be it enacted by the General Assembly of Virginia:

1. That §§ 58-921, 58-925, and 58-928 of the Code of Virginia be amended and reenacted as follows:

§ 58-921. No county treasurer shall refuse to pay any warrant legally drawn upon him and presented for payment for the reason that a warrant of prior presentation has not been paid,

when there shall be appropriated money in the treasury belonging to the fund drawn upon available and sufficient to pay such prior warrant and also the warrant so presented; but such treasurer shall, as he may receive moneys into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants previously presented and in the order presented. He shall receive in payment of the county levy and county warrant drawn in favor of any taxpayer, whether such warrant has been entered in the treasurer's book or not, but if the warrant has been transferred it shall be subject to any county levy owing by the taxpayer in whose favor the same was issued. When the warrant is for a larger sum than the county levy due from the payee or transferee of the warrant, the treasurer shall endorse on the warrant a credit for the amount of the county levy so due and such payee or transferee shall execute to the treasurer a receipt for such amount, specifying

the number and date of the warrant on which it was credited; and the residue of the warrant shall be paid according to the order of its entry in the treasurer's book. Copies of all appropriations, and ordinances and resolutions appropriating funds by the governing body, shall be delivered to the treasurer by the clerk of the governing body.

§ 58-925. The treasurer shall receive the county levy in the manner prescribed for the receipt of the State revenue and shall, at the August meeting of the board of supervisors or other governing body of the county, or within thirty days thereafter, settle with the supervisors or other such body his accounts for that year; and out of the balance shown to be in his hands upon the settlement he shall at once pay all warrants drawn on the *appropriations for that year not previously paid, in the order of their presentation. And when his term of office expires or if he die, resign or be removed from office, he, upon the expiration of his term of office, resignation, or removal, or his personal representative, upon his death, shall immediately make such settlement, showing the amount in

his hands to be accounted for and the fund to which the same belongs and deliver to his successor all bonds belonging to his office and all money belonging to the county.

§ 58-928. If any such treasurer fail to pay, upon presentation, any legal warrant, having in his hands at the time appropriated funds out of which the same ought to be paid, or fail to set apart necessary funds, when the same *are appropriated and come into his hands, for the payment thereof in its order, if listed under § 58-920, and to pay over the amount due upon such warrant as soon thereafter as the same may be again presented, the holder thereof may, on motion in his own name, in the circuit court of the treasurer's county, recover from him and his sureties the amount of such warrant, together with damages at the rate of ten per centum per month on the amount from the time such treasurer should have paid the same and the costs of such motion, including an attorney's fee of five dollars.

2. An emergency exists and this Act shall be in force on and after July 1, 1959.

EDUCATION

Public Schools—Virginia

Chapter 52 (Senate Bill 28) of the Acts of the 1959 Virginia General Assembly, approved April 24, 1959, provides for the time of fixing levies by local governing bodies; prohibits considering as available, allocated, or expended for any purpose, funds collected from general levies until the governing body has appropriated funds for that purpose; and requires notice to be given by local governing bodies before increasing tax levies.

AN ACT to amend and reenact §§ 58-839 and 58-844 of the Code of Virginia, relating to the fixing and making of county, city, town, and district levies by governing bodies; to provide that such levies shall be fixed or made not later than a regular or called meeting in June; and to provide that no funds collected from general levies shall be considered available, allocated, or expended for any purpose until there has been an appropriation of funds for that purpose by the governing body; and to add § 58-846.1 to the Code of Virginia, to provide that notice shall be given before any local

tax levy shall be increased in any county, city, town or district.

Be it enacted by the General Assembly of Virginia:

1. That §§ 58-839 and 58-844 of the Code of Virginia be amended and reenacted and that § 58-846.1 be added to the Code of Virginia as follows:

§ 58-839. The board of supervisors or other governing body of each county shall, at their regular meeting in the month of January in each

year, or as soon thereafter as practicable not later than a regular or called meeting in * June, fix the amount of the county and district levies for the current year, shall order the levy on all property within the county segregated by law for local taxation, and shall order the levy on the real estate and tangible personal property of public service corporations based upon the assessment fixed by the State Corporation Commission, and certified by it to the board of supervisors or other governing body, both with respect to location and valuation; any such governing body may provide that if any taxpayer owns tangible personal property of such small value that the local levies thereon for the year result in a tax of less than one dollar, such property may be omitted from the personal property book and no assessment made thereon.*

The making of a general county levy or the imposition of other taxes or the collection of such levy or taxes shall not constitute an appropriation nor an obligation or duty to appropriate any funds by the board of supervisors or other governing body of any county for any purpose, expenditure or contemplated expenditure. The laying or making of a levy in an amount sufficient to cover or pay all estimated and contemplated expenditures for the fiscal year shall not be construed as imposing any obligation or duty on the board of supervisors or other governing body to appropriate any amount whatsoever. No part of the funds raised by the general county levies or taxes shall be considered available, allocated or expended for any purpose until there has been an appropriation of funds for that expenditure or purpose by the board of supervisors or other governing body either annually, semiannually, quarterly, or monthly. There shall be no mandatory duty upon the board of supervisors or other governing body of any county to appropriate any funds raised by general county levies or taxes except to pay the principal and interest on bonds and other legal obligations of the county or district and to pay obligations of the county or its agencies and departments arising under contracts executed or approved by the board of supervisors or other governing body, unless otherwise specifically provided by statute. Any funds collected and not expended in any fiscal year shall be carried over to the succeeding fiscal years and shall be available for appropriation for any governmental purposes in those years.

§ 58-844. The council of every city and town shall annually cause to be made up and entered on their journals an account of all sums lawfully chargeable on the city or town which ought to be paid within one year and order a city or town levy of so much as in their opinion is necessary to be raised in that way in addition to what may be received for licenses and from other sources; any such governing body may provide that if any taxpayer owns tangible personal property of such small value that the local levies thereon for the year result in a tax of less than one dollar, such property may be omitted from the personal property book and no assessment made thereon. The levy so ordered may be upon the persons in the city or town above the age of twenty-one years, not exempt by law from the payment of the State capitation tax, and upon any property therein subject to local taxation and not expressly segregated to the State for purposes of State taxation only.

The making of a general city or town levy or imposition of other taxes or the collection of such levy or taxes shall not constitute an appropriation nor an obligation or duty to appropriate any funds by the council of any city or town for any purpose, expenditure, or contemplated expenditure. The laying or making of a levy in an amount sufficient to cover or pay all estimated and contemplated expenditures for the fiscal year shall not be construed as imposing any obligation or duty on the council to appropriate any amount whatsoever. No part of the funds raised by the general city or town levies or taxes shall be considered available, allocated, or expended for any purpose until there has been an appropriation of funds for that expenditure or purpose by the council either annually, semiannually, quarterly, or monthly. There shall be no mandatory duty upon the council of any city or town to appropriate any funds raised by general city or town levies or taxes except to pay the principal and interest on bonds and other legal obligations of the city or town and to pay obligations of the city or town or its agencies and departments arising under contracts executed or approved by the council, unless otherwise specifically provided by statute. Any funds collected and not expended in any fiscal year shall be carried over to the succeeding fiscal years and shall be available for appropriation for any governmental purposes in those years. This section shall be applicable to all cities and towns in the State and the provisions of any

charter of any city or town inconsistent or in conflict with this section shall be inoperative to the extent of such inconsistency or conflict.

§ 58-846.1. Before any local tax levy shall be increased in any county, city, town, or district, such proposed increase shall be published in a newspaper having general circulation in the

locality affected at least fifteen days before the increased levy is made and the citizens of the locality shall be given an opportunity to appear before, and be heard by, the local governing body on the subject of such increase.

2. An emergency exists and this Act is in force from its passage.

EDUCATION

Public Schools—Virginia

Chapter 53 (Senate Bill 32) of the Acts of the 1959 General Assembly, approved April 24, 1959, requires each local governing body to finance from public funds, according to a specified formula, minimum scholarships for children residing in the locality who attend nonsectarian private schools or public schools outside the locality, the State Board of Education being directed to prescribe academic standards for such private schools but forbidden to deal in any way with their admission rules. If a locality fails to provide scholarship funds for those entitled, the Superintendent of Public Instruction is to make those payments in behalf of such locality and report the same to the State Comptroller, who is then required to reimburse the state from state funds becoming available to the locality. Chapters 56, 57, 58 and 62 of the Acts of the 1956 Extra Session [1 Race Rel. L. Rep. 1091, 1093, 1094, 1097 (1956)], as amended [3 Race Rel. L. Rep. 340 (1958)], containing previous provisions concerning grants to pupils attending private nonsectarian schools, are repealed.

AN ACT to encourage the education of the children of the Commonwealth by providing scholarships for the education of such children in nonsectarian private schools and in public schools located outside of the locality in which they reside; to provide for the manner in which such scholarships shall be made available and the extent of State and local participation in the payment of such scholarships; and to make unlawful the improper obtaining or expending of funds provided for such scholarships; and to repeal Chapter 56, Acts of Assembly, Extra Session 1956, and Chapter 7.1 of Title 22 of the Code, consisting of §§ 22-115.1 through 22-115.21, relating to grants for education of children in private schools.

Be it enacted by the General Assembly of Virginia:

1. § 1. The General Assembly, mindful of the need for a literate and informed citizenry, hereby

declares that it is the policy of this Commonwealth to encourage the education of all of the children of Virginia. In furtherance of this objective, the General Assembly finds that in addition to providing instruction in the public schools, it is desirable and in the public interest that scholarships should be provided from the public funds of the State and localities for the education of the children in nonsectarian private schools and in public schools located outside of the locality where the children reside.

§ 2. The governing body of each county, city or town, if the town be a separate school district approved for operation, shall appropriate out of the general tax revenues of the locality and out of funds made available to the locality for such purpose by the State such amounts as may be necessary to provide scholarships of at least the minimum amount specified by § 5 of this Act for children of school age residing in such locality within the meaning of § 22-218 of the Code of Virginia but who attend nonsectarian private

schools in or outside such locality or public schools located outside such locality.

§ 3. The funds made available for such scholarships shall be expended by the local school boards pursuant to rules and regulations promulgated by the State Board of Education. Such funds shall be appropriated and recorded separately from funds made available to the school board for the maintenance and operation of the public schools and no funds appropriated for scholarships shall be used or be available to be used for the maintenance or operation of the public schools.

§ 4. The State Board of Education is hereby authorized and directed to promulgate rules and regulations for the administration of this Act. Such rules and regulations may prescribe the minimum academic standards that shall be met by any nonsectarian private school attended by a child to entitle such child to a scholarship, but shall not deal in any way with the requirements of such school concerning the eligibility of pupils who may be admitted thereto. The State Board of Education may also provide for the payment of such scholarships in installments and for their proration in the case of children attending school less than a full school year.

§ 5. The amount of the minimum scholarship to be provided out of joint State and local funds for each child for a full school year shall be two hundred and fifty dollars or the amount equal to the actual cost of tuition at the school attended by such child or the total cost of operation, excluding debt service and capital outlay, per pupil in average daily attendance in the public schools of the locality providing such scholarships, as determined by the Superintendent of Public Instruction for the school year 1958-1959, whichever of such three sums is the lowest. In the case of a locality in which public schools were closed during the school year 1958-1959 under the provisions of Chapter 68, Acts of Assembly, Extra Session 1956, the cost of operation for the school year 1957-1958 shall be used in making such computation. The locality shall contribute out of local tax revenues for each such scholarship provided for a child residing in such locality the amount obtained by multiplying the amount of the scholarship by the percentage which the expenditure out of local funds is of the total such cost per pupil in average daily attendance in such locality for the school year 1958-1959 or 1957-1957 as the case

may be. The balance of such minimum scholarship shall be provided out of State funds appropriated to the locality for such purpose. The governing body of each county, city and town, if the town be a separate school district approved for operation, may appropriate from local revenues additional sums for the purpose of supplementing such minimum scholarships. The amount of the scholarship shall be paid to the parent or guardian of, or the person standing in loco parentis to, the child. The local school board shall require the recipients of the scholarship funds to furnish receipts or other evidence showing that the funds were expended for the purpose for which the scholarships were granted.

§ 6. It shall be unlawful for any person to obtain, seek to obtain, expend, or seek to expend, any scholarship funds for any purpose other than in payment of or reimbursement for the tuition costs for the attendance of his child or ward at a nonsectarian private school in or outside the locality making such scholarship grant or a public school located outside such locality. A violation of this section shall, except for offenses punishable under § 18-237 of the Code, constitute a misdemeanor and be punished as provided by law.

§ 7. If a locality fails to provide the scholarship funds under the provisions of this Act for those entitled thereto, the State Board of Education shall authorize and direct the Superintendent of Public Instruction, under rules and regulations of the State Board of Education, to provide for the payment of such scholarships on behalf of such locality. In such event the Superintendent of Public Instruction shall, at the end of each month, file with the State Comptroller and with the school board and the governing body of such locality a statement showing all disbursements so made on behalf of such locality, and the Comptroller shall from time to time as such funds become available deduct from other State funds appropriated for distribution to such locality the amount required to reimburse the State for expenditures incurred under the provisions of this section, provided that in no event shall any funds to which such locality may be entitled under the provisions of Title 63 of the Code or for the operation of public schools be withheld under the provisions of this section; and provided further that, except out of funds appropriated for distribution to such locality to assist it in providing the

minimum scholarships under this Act, no greater amount shall be withheld on account of any scholarship paid directly by the State under the provisions of this section than the amount of the locality's share of the minimum scholarship.

2. That Chapter 56, Acts of Assembly, Extra Session 1956, and Chapter 7.1 of Title 22 of the Code of Virginia, consisting of §§ 22-115.1 through 22-115.21, and all amendments thereof, are hereby repealed.

EDUCATION

Public Schools—Virginia

Chapter 69 (Senate Bill 26) of the Acts of the 1959 Virginia General Assembly, approved April 27, 1959, requires the performance of certain duties by county officers, including the director of finance and the county manager or executive secretary; provides that budgets of local governmental units shall be only for informative and fiscal planning purposes; prohibits making moneys available for payment of contemplated expenditures prior to appropriations; requires certain estimates of financial needs to be submitted to governing bodies; and repeals statutory provisions concerning notice before increasing local tax levies.

AN ACT to amend and reenact §§ 15-288, 15-320, 15-353, 15-370, 15-395, 15-551.3, 15-575, 15-576, 15-577, 15-579, 15-584 and 15-585 of the Code of Virginia, relating to duties of the director of finance, county manager or executive secretary in certain counties, to application of moneys of cities and towns, to the duties of executive secretaries for counties, and to budgets of counties, cities, and towns, to provide budget shall be for informative and fiscal planning purposes only, to provide no moneys shall be available to be paid out for any contemplated expenditures unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditures, to require certain estimates of financial needs be submitted to governing bodies, to change the time for publishing and holding hearings on the budget, and to repeal § 15-582 of the Code of Virginia, relating to notice of tax increase before any local tax levy shall be increased.

Be it enacted by the General Assembly of Virginia:

1. That §§ 15-288, 15-320, 15-353, 15-370, 15-395, 15-551.3, 15-575, 15-576, 15-577, 15-579, 15-584, and 15-585 of the Code of Virginia be amended and reenacted as follows:

§ 15-288.—(a) Director; general duties.—The director of finance shall be head of the depart-

ment of finance and as such have charge of the administration of the financial affairs of the county, including the budget; the assessment of property for taxation; the collection of taxes, license fees and other revenues; the custody of all public funds belonging to or handled by the county; supervision of the expenditures of the county and its subdivisions; the disbursement of county funds; the purchase, storage and distribution of all supplies, materials, equipment and contractual services needed by any department, office or other using agency of the county unless some other officer or employee is designated for this purpose; the keeping and supervision of all accounts; and such other duties as the board of county supervisors may by ordinance or resolution require.

(b) Expenditures and accounts.—No money shall be drawn from the treasury of the county, nor shall any obligation for the expenditure of money be incurred, except in pursuance of * appropriation * resolutions. Accounts shall be kept for each item of appropriation made by the board of county supervisors. Each such account shall show in detail the appropriations made thereto, the amount drawn thereon, the unpaid obligation charged against it, and the unencumbered balance in the appropriation account, properly chargeable, sufficient to meet the obligation entailed by contract, agreement or order.

(c) Powers of commissioners of revenue.—The director of finance shall exercise all the

powers conferred and perform all the duties imposed by general law upon commissioners of the revenue, not inconsistent herewith, and shall be subject to the obligations and penalties imposed by general law.

(d) Real estate reassessments.—Every general reassessment of real estate in the county, unless some other person be designated for this purpose by the board of county supervisors in accordance with § 15-281 or unless the board shall create a separate department of assessments in accordance with § 15-287 shall be made by the director of finance; he shall collect and keep in his office data and devise methods and procedure to be followed in each such general reassessment that will make for uniformity in assessments throughout the county.

(e) Powers of county treasurer; deposit of moneys.—The director of finance shall also exercise all the powers conferred and perform all the duties imposed by general law upon county treasurers, and shall be subject to all the obligations and penalties imposed by general law. All moneys received by any officer or employee of the county for or in connection with the business of the county shall be paid promptly into the hands of the director of finance; all such money shall be promptly deposited by the director of finance to the credit of the county in such banks or trust companies as shall be selected by the board of county supervisors. No money shall be disbursed or paid out by the county except upon check signed by the chairman of the board of county supervisors, or such other person as may be designated by the board, and countersigned by the director of the department of finance.

The board may designate one or more banks or trust companies as a receiving or collecting agency or agencies under the direction of the department of finance. All funds so collected or received shall be deposited to the credit of the county in such banks or trust companies as shall be selected by the board.

Every bank or trust company serving as a depository or as a receiving or collecting agency for county funds shall be required by the board of county supervisors to give adequate security therefor and to meet such requirements as to interest thereon as the board may by ordinance or resolution establish. All interest on money so deposited shall accrue to the benefit of the county.

(f) Claims against counties; accounts.—The

director of finance shall audit all claims against the county for goods or services; it shall also be his duty to ascertain that such claims are in accordance with the purchase orders or contracts of employment from which same arise; to present such claims to the board of county supervisors for approval after such audit; to draw all checks in settlement of such claims after approval by the board of county supervisors; to keep a record of the revenues and expenditures of the county; to keep such accounts and records of the affairs of the county as shall be prescribed by the Auditor of Public Accounts; and at the end of each month to prepare and submit to the board of county supervisors statements showing the progress and status of the affairs of the county in such form as shall be agreed upon by the Auditor of Public Accounts and the board of county supervisors.

(g) Director as purchasing agent.—The director of finance shall act as purchasing agent for the county, unless the board of county supervisors shall designate some other officer or employee for such purpose. The director of finance or the person designated as purchasing agent shall make all purchases, subject to such exceptions as may be allowed by the board of county supervisors, for the county in such manner as may be provided by resolution of the board. He shall have authority to make transfers of supplies, materials and equipment between departments and offices, to sell any surplus supplies, materials or equipment and to make such other sales as may be authorized by the board of county supervisors. He shall also have power, with the approval of the board of county supervisors, to establish suitable specifications or standards for all supplies, materials and equipment to be purchased for the county and to inspect all deliveries to determine their compliance with such specifications and standards. He shall have charge of such storerooms and warehouses of the county as the board of county supervisors may provide.

All purchases and sales shall be made under such rules and regulations as the board of county supervisors may by ordinance or resolution establish. Subject to such exceptions as the board may provide, he shall before making any purchase or sale invite competitive bidding under such rules and regulations as the board may by ordinance or resolution establish. He shall not furnish any supplies, materials, equipment or contractual services to any department or office

except upon receipt of a properly approved requisition and unless there be an unencumbered appropriation balance sufficient to pay for the same.

(h) Other duties.—He shall perform such other duties as may be imposed upon him by the board of county supervisors.

(i) Assistants.—The director may have such deputies or assistants in the performance of his duties as may be allowed by the board of county supervisors.

(j) Approval of chief assessing officer.—Before the appointment of the chief assessing officer of the county, whether he be the director of finance, a deputy or supervisor of assessments in the department of finance or the head of the department of assessments, shall become effective, it shall be approved by the State Tax Commissioner and such officer shall be subject to the obligations and penalties imposed by general law upon commissioners of the revenue.

§ 15-320.—(a) Director; general duties.—The director of finance shall be the head of the department of finance and as such have charge of the administration of the financial affairs of the county, including the budget; the assessment of property for taxation; the collection of taxes, license fees and other revenues; the custody of all public funds belonging to or handled by the county; supervision of the expenditures of the county and its subdivisions; the disbursement of county funds; the purchase, storage and distribution of all supplies, materials, equipment and contractual service needed by any department, office or other using agency of the county unless some other officer or employee is designated for this purpose; the keeping and supervision of all accounts; and such other duties as the board of county supervisors may by ordinance or resolution require.

(b) Expenditures and accounts.—No money shall be drawn from the treasury of the county, nor shall any obligation for the expenditure of money be incurred except in pursuance of * appropriation * resolutions. Accounts shall be kept for each item of appropriation made by the board of county supervisors. Each such account shall show in detail the appropriations made thereto, the amount drawn thereon, the unpaid obligations charged against it, and the unencumbered balance in the appropriation account, properly chargeable, sufficient to meet the obligation entailed by contract, agreement or order.

(c) Powers of commissioners of revenue.—The director of finance shall exercise all the powers conferred and perform all the duties imposed by general law upon commissioners of the revenue, not inconsistent herewith, and shall be subject to the obligations and penalties imposed by general law.

(d) (1) Real estate reassessments.—Every general reassessment of real estate in the county, unless some other person be designated for this purpose by the county manager in accordance with § 15-314 or unless the board of county supervisors shall create a separate department of assessments in accordance with § 15-319, shall be made by the director of finance; he shall collect and keep in his office data and devise methods and procedure to be followed in each such general reassessment that will make for uniformity in assessments throughout the county.

(2) In addition to any other method provided by general law or by this article or to certain classified counties, the director of finance may provide for the annual assessment and equalization of real estate and any general reassessment ordered by the board of county supervisors. The director of finance or his designated agent shall collect data, provide maps and charts, devise methods and procedures to be followed for such assessment that will make for uniformity in assessments throughout the county.

There shall be a reassessment of all real estate at periods not to exceed six (6) years between each reassessment.

All real estate shall be assessed as of January first of each year by the director of finance or such other person designated to make such assessment and such annual assessment shall provide for the equalization of assessments of real estate, correction of errors to the tax assessment records, addition of erroneously omitted properties to the tax rolls, and the removal of properties acquired by owners not subject to taxation.

The taxes for each year on such real estate assessed shall be extended on the basis of the last assessment made prior to such year.

This section shall not apply to real estate assessable under the law by the State Corporation Commission, and the director of finance or his designated agent shall not make any real estate assessments during the life of any general reassessment board.

Any reassessments made, which shall change the assessment of real estate shall not be ex-

tended for taxation until forty-five days after there is mailed a written notice to the person in whose name such property is to be assessed at his last known address, setting forth the amount of the prior assessment and the new assessment.

The board of county supervisors shall establish a continuing board of real estate review and equalization to review all assessments made under authority of this section and to which all appeals by any person aggrieved by any real estate assessment shall first apply for relief. The board so established shall consist of not less than three nor more than five members who shall be freeholders in the county. The appointment, terms of office and compensation of the members of such board shall be prescribed by the board of county supervisors; such board shall have all the powers conferred upon boards of equalization by general law. All applications for review to such board shall be made not later than April first of the year for which extension of taxes on the assessment is to be made. Such board shall grant a hearing to any person making application at a regular advertised meeting of the board and shall rule on all applications within sixty days after the date of the hearing, and shall thereafter promptly certify its action thereon to the director of finance, shall conduct hearings at such time or times as is convenient after publishing a notice in a newspaper having general circulation in the county, ten days prior to such hearing at which any person applying for review will be heard.

Any person aggrieved by any reassessment or action of the real estate board of review and equalization may apply for relief to the circuit court of the county in the manner provided by general law.

(e) Powers of county treasurer; deposit of moneys.—The director of finance shall also exercise all the powers conferred and perform all the duties imposed by general law upon county treasurers, and shall be subject to all the obligations and penalties imposed by general law. All moneys received by any officer or employee of the county for or in connection with the business of the county shall be paid promptly into the hands of the director of finance; all such money shall be promptly deposited by the director of finance to the credit of the county in such banks or trust companies as shall be selected by the board of county supervisors. No money shall be disbursed or paid out by the county except upon check signed by the chairman of the board

of county supervisors, or such other person as may be designated by the board, and countersigned by the director of the department of finance.

The board may designate one or more banks or trust companies as a receiving or collecting agency or agencies under the direction of the department of finance. All funds so collected or received shall be deposited to the credit of the county in such banks or trust companies as shall be selected by the board.

Every bank or trust company serving as a depository or as a receiving or collecting agency for county funds shall be required by the board of county supervisors to give adequate security therefor, and to meet such requirements as to interest thereon as the board may by ordinance or resolution establish. All interest on money so deposited shall accrue to the benefit of the county.

(f) Claims against counties; accounts.—The director of finance shall audit all claims against the county for goods or services; it shall also be his duty to ascertain that such claims are in accordance with the purchase orders or contracts of employment from which same arise; to present such claims to the board of county supervisors for approval after such audit; to draw all checks in settlement of such claims after approval by the board of county supervisors unless the said board otherwise provides pursuant to the provisions of § 15-253; to keep a record of the revenues and expenditures of the county; to keep such accounts and records of the affairs of the county as shall be prescribed by the Auditor of Public Accounts; and at the end of each month to prepare and submit to the board of county supervisors statements showing the progress and status of the affairs of the county in such form as shall be agreed upon by the Auditor of Public Accounts and the board of county supervisors.

(g) Director as purchasing agent.—The director of finance shall act as purchasing agent for the county, unless the board of county supervisors shall designate some other officer or employee for such purpose. The director of finance or the person designated as purchasing agent shall make all purchases, subject to such exceptions as may be allowed by the board of county supervisors, for the county in such manner as may be provided by resolution of the board. He shall have authority to make transfers of supplies, materials and equipment between departments and officers, to sell any surplus

supplies, materials or equipment and to make such other sales as may be authorized by the board of county supervisors. He shall also have power, with the approval of the board of county supervisors, to establish suitable specifications or standards for all supplies, materials and equipment to be purchased for the county and to inspect all deliveries to determine their compliance with such specifications and standards. He shall further have the power, with the approval of the board of county supervisors, to sell supplies, materials, and equipment to volunteer rescue squads and firefighting companies at the same cost as the cost of such supplies, materials and equipment to the county. He shall have charge of such storerooms and warehouses of the county as the board of county supervisors may provide.

All purchases and sales shall be made under such rules and regulations as the board of county supervisors may by ordinance or resolution establish. Subject to such exceptions as the board may provide, he shall before making any purchase or sale invite competitive bidding under such rules and regulations as the board may by ordinance or resolution establish. He shall not furnish any supplies, materials, equipment or contractual services to any department or office except upon receipt of a properly approved requisition and unless there be an unencumbered appropriation balance sufficient to pay for the same.

(h) Other duties.—He shall perform such other duties as may be imposed upon him by the board of county supervisors.

(i) Assistants.—The director may have such deputies or assistants in the performance of his duties as may be allowed by the board of county supervisors.

(j) Approval of chief assessing officer.—Before the appointment of the chief assessing officer of the county (whether he be the director of finance, a deputy or supervisor of assessments in the department of finance or the head of the department of assessments) shall become effective, it shall be approved by the State Tax Commissioner and such officer shall be subject to the obligations and penalties imposed by general law upon commissioners of the revenue.

§ 15-353.—In addition to such other duties as are or may be prescribed by law or directed by the board, the county manager in counties having a population of five hundred or more per square mile shall each year on or before * April fifteenth prepare and submit to the board a

tentative budget for *informative and fiscal planning purposes only* prepared in accordance with the provisions of law in effect governing the preparation of the county budget and showing in detail the recommendations of the county manager for expenditures on each road and bridge or for other purposes.*

The county manager shall be the executive and administrative officer of the county in all matters relating to the public roads and bridges of the county, and other public work and business of the county, except public schools, and shall have general supervision and charge of all construction and maintenance of the public roads, bridges and landings of the county, and all public work and business of the county, except public schools, and the purchase of all supplies, equipment and materials for the roads, bridges and landings and other public work and business of the county, and the employment of all superintendents, foremen and labor therefor; provided, however, that the county board may, by ordinance, prescribe rules and regulations for the purchase of all supplies, equipment and materials for the roads, bridges and landings and other public work and business of the county.

The county manager shall keep the board advised as to the financial condition of the county, and at each regular meeting of the board he shall present to the board an itemized statement of all expenditures made by him since his last report, and on or before July fifteenth of each year shall file with the clerk of the board an itemized statement showing the amount expended on each road, bridge or for other purposes for the year preceding, ending June thirtieth.

§ 15-370.—(a) The board of county supervisors may by resolution designate the executive secretary as clerk of the board of county supervisors. In such case and upon the qualification of the executive secretary authorized by this article the county clerk of such county shall be relieved of his duties in connection with the board of county supervisors and all of his duties shall be imposed upon and performed by the executive secretary. If the board of county supervisors does not designate the executive secretary as clerk, the county clerk or one of his deputies shall attend the meetings of said board and record in a book provided for the purpose all of the proceedings of the board, but he shall not be authorized and required to sign the war-

rants of the board, if any, such authority being hereby vested in the executive secretary; provided, however, the board of county supervisors may by resolution of record require the county clerk to sign all warrants of the board of county supervisors.

(b) He shall, in so far as he shall be required by the board of county supervisors, be responsible to the board for the proper administration of all affairs of the county which the board has authority to control. He shall keep the board advised as to the financial condition of the county and shall submit to the board monthly, and at such other times as may be required, reports concerning the administrative affairs of the county.

(c) The executive secretary shall, if required by the board of county supervisors, examine regularly the books and papers of each department, officer and agency of the county and report to the board the condition in which he finds them and such other information as the board may direct.

(d) He shall from time to time submit to the board such recommendations concerning the affairs of the county and its departments, officers and agencies as he shall deem proper.

(e) Under the direction of the board of county supervisors, the executive secretary for *informative and fiscal planning purposes only* shall * prepare and submit to the board a proposed annual budget for the county. * The board of county supervisors may, however, direct that the county budget be prepared by the county clerk.

(f) He shall audit all claims against the county for services, materials and equipment for such county agencies and departments as the board of county supervisors may direct, except those required to be received and audited by the county school board, and shall present the same to the board of county supervisors together with his recommendation and such information as shall be necessary to enable the board to act with reference to such claims.

(g) In case the board of county supervisors shall by resolution of record designate the executive secretary as clerk of the board of county supervisors, such executive secretary shall have the following powers, authority and duties: (1) All the powers, authority and duties vested in the county clerk as clerk of the board of supervisors, under general law; (2) To pay, with his warrant, all claims against the county chargeable

against any fund under the control of the board of county supervisors, other than the general county fund, when such expenditure is authorized and approved by the officer and/or employee authorized to procure the services, supplies, materials or equipment accountable for such claims, and after auditing the same as to its authority and correctness; to pay with his warrant all claims against the county chargeable against the general county fund where the claim arose out of purchase made by the executive secretary or for contractual services by him authorized and contracted within the power and authority given him by the board of county supervisors by resolution; (3) He shall pay with his warrant all claims against the county authorized to be paid by the board of county supervisors.

§ 15-395. All moneys collected or received for any city or town shall be applied as the council thereof may direct *by duly approved appropriation resolutions*; and the council and the clerk of of the circuit and corporation courts shall cause to be made out quarterly an itemized statement of all accounts authorized to be paid by the council and by the judge of the circuit and corporation court and cause the same to be posted at the front door of the courthouse or other public place in the city or town and also to be published in such newspaper as the council may direct.

§ 15-551.3. Powers and duties.—The executive secretary shall be clerk to the governing body. It shall be his general duty:

(1) To record in a book to be provided for that purpose all of the proceedings of the governing body.

(2) To make regular entries of all the governing body's resolutions and decisions on all questions concerning the raising of money; and within five days after any order for a levy is made, to deliver a copy thereof to the commissioner of the revenue of his county.

(3) To record the vote of each supervisor on any question submitted to the governing body, if required by any member present.

(4) To sign all warrants issued by the governing body for the payment of money, and to record, in a book provided for that purpose, the reports of the county treasurer of his receipts and disbursements.

(5) To preserve and file all accounts and pa-

pers acted upon by the governing body with its action thereon.

(6) To make recommendations to the governing body concerning any office or department of the county government or employee under the control and supervision of the governing body.

(7) To attend to the execution of and enforce all lawful resolutions and orders of the governing body concerning any department, office or employee in the county government, and shall see that all laws of the State required to be enforced through the governing body or any county officer or employee subject to the control of the governing body are faithfully executed, and to make report to the governing body how such orders, resolutions and laws have been executed.

(8) To confer with any person concerning the affairs of the county government and to make report to the governing body of all such matters whereon it should take action.

(9) To make monthly reports to the governing body in regard to matters of administration, and keep it fully advised as to the financial condition of the county.

(10) He *for informative and fiscal planning purposes only* shall prepare and submit to the governing body, in accordance with general law, *a budget*.

(11) To audit all claims of every character or nature against the county, except those required to be received and audited by the county school board, to ascertain that such claims are in accordance with the purchase orders or contracts of employment or in accordance with the law from which same arise; to present such claims to the governing body for approval and allowance after such audit; to draw all warrants in settlement of such claims after approval and allowance by the governing body. However, he shall pay, with his warrant, all lawful claims out of the appropriations from the various funds, such as routine or standard charges for which such funds were set up, upon the approval of the department head who is charged with expenditure of such fund, in the manner hereinafter authorized; to keep a record of the revenues and expenditures of the county; to keep such accounts and records of the affairs of the county as shall be prescribed by the governing body; and monthly to prepare and submit to the governing body statements showing the progress and status of the affairs of the county in such form as shall be specified by the governing body.

(12) To act as purchasing agent for the county; to make all purchases for the county subject to such exception as may be allowed by the governing body. He shall have authority to make transfer of supplies, materials and equipment between departments and officers, and employees; to sell any surplus supplies, materials and equipment and to make such other sales as may be authorized by the governing body. He shall have power, with consent of the governing body, to establish suitable specifications or standards for all supplies, materials and equipment to be purchased for the county, and to inspect all deliveries to determine their compliance with such specifications and standards, and if such deliveries are not in accordance with such specifications and standards it shall be his duty and he is empowered to reject the same. He shall have charge of such storerooms and warehouses of the county as the governing body may provide. He shall have the care and charge of all public buildings and the furnishings and fixtures therein under the control of the governing body.

All purchases and sales shall be made under such rules and regulations as the governing body may by ordinance or resolution establish. Subject to such exception as the governing body may provide, he shall before making any purchase or sale invite competitive bidding under such rules and regulations as the governing body may by ordinance or resolution establish. He shall not furnish any supplies, materials, equipment or contractual services to any department or office or employee, except upon receipt of a properly approved requisition and unless there be an unencumbered balance sufficient to pay the same.

(13) To pay, with his warrant, all claims against the county chargeable against any fund under the control of the governing body other than the general county fund, when such expenditure is authorized and approved by the officer and/or employee authorized to procure the services, supplies, materials or equipment accountable for such claims, and after auditing the same as to its authority and correctness; to pay, with his warrant, all claims against the county chargeable against the general county fund where the claim arose out of purchase made by the executive secretary or for contractual services by him authorized and contracted within the power and authority given him by the governing body by resolution. Whenever any such payment is made the executive secretary shall

make report of the same in such form as may be prescribed by the governing body.

(14) To perform such other duties as may be imposed upon him by the governing body.

(15) To perform all such duties as may be required of him by the governing body within the terms of the preceding fourteen subsections of this section as may be evidenced by a resolution of the governing body made of record.

(16) To perform all duties imposed by law upon the county clerk as clerk of the governing body; all duties imposed upon the county purchasing agent, and all duties imposed upon the "local delinquent tax collector" provided for in §§ 58-990 and 58-991 of the Code, if such governing body so require of him, in which event he shall have all the powers and duties imposed by that section.

(17) *He shall not approve, draw or permit to be paid any warrant drawn for any purpose unless there has been an appropriation of funds by the board of supervisors for that purpose, any other provision of this Article to the contrary notwithstanding.*

§ 15-575.—All officers and heads of departments, officers, divisions, boards, commissions, and agencies of every county, city, and town shall, on or before the first day of May, 1959, and on or before the first day of April of each year thereafter, prepare and submit to the board of supervisors or council an estimate of the amount of money deemed to be needed during the ensuing fiscal year for his department, office, division, board, commission, or agency; provided, that in any locality where the fiscal year begins on some date other than the first day of July, the estimate shall be submitted at least three months prior to the beginning of the fiscal year. If such person does not submit an estimate in accordance with this section, the clerk of the board of supervisors or council or other designated person or persons shall prepare and submit an estimate for that department, office, division, board, commission or agency. * The board of supervisors of the counties and the councils of the cities and towns shall prepare a budget for informative and fiscal planning purposes only, containing a complete itemized and classified plan for all * contemplated expenditures and all estimated revenues and borrowings for the locality or any subdivision thereof for the ensuing * fiscal year, which shall begin for each county on the first day of July of each year or

at such other date as may be provided by law for the beginning of the * fiscal year.

§ 15-576.—Opposite each item of the * contemplated expenditures the budget shall show in separate parallel columns the aggregate amount appropriated * during the preceding * fiscal year, the amount expended during that year, the aggregate amount appropriated * and expected to be appropriated during the current fiscal year, and the increases or decreases in the * contemplated expenditures for the ensuing year as compared with the * aggregate amount appropriated or expected to be appropriated for the current year. This budget shall be accompanied by:

(1) A statement of the contemplated revenue and disbursements, liabilities, reserves and surplus or deficit of the county, city or town as of the date of the preparation of the budget.

(2) An itemized and complete financial balance sheet for the locality at the close of the last preceding * fiscal year.

§ 15-577.—For informative and fiscal planning purposes only a brief synopsis of the budget shall be published in a newspaper having general circulation in the locality affected, and notice given of one or more public hearings, at least *seven days prior to the date set for hearing, at which any citizen of the locality shall have the right to attend and state his views thereon. The board of supervisors of any county not having a newspaper of general circulation may in lieu of the foregoing notice provide for notice by written or printed handbills, posted at such places as it may direct *. The hearing shall be held at least seven days prior to the beginning of the fiscal year; provided that the governing body may recess or adjourn from day to day or time to time during such hearing. The fact of such notice and hearing shall be entered of record in the minute book.

The * contemplated expenditure for * all purposes as contained in * the budget prepared under §§ 15-575 and 15-576 and published under this section shall be * for informative and fiscal planning purposes only and shall not be deemed to be an appropriation. No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the board, council or other governing body.

§ 15-579.—* *The Director of the Division of the Budget shall prescribe and furnish for the boards of supervisors * forms and classifications * to aid in the preparation of county budgets.*

§ 15-584.—* *The governing body of any county having a special budget law may * elect to comply with the provisions of this chapter rather than those of the special budget law for that county.*

§ 15-585.—* *The Council of any city or town whose charter contains provisions for a budget * may elect to comply with the provisions of this chapter rather than those contained in the charter.*

2. That § 15-582 of the Code of Virginia is repealed.

3. An emergency exists and this Act is in effect from its passage.

EDUCATION

Public Schools—Virginia

Chapter 71 (House Bill 50) of the Acts of the 1959 Virginia General Assembly, approved April 28, 1959, complements that state's Pupil Placement Act [1 Race Rel. L. Rep. 1109 (1956)] as amended [3 Race Rel. L. Rep. 343 (1958)], which had vested all power of placement of pupils and determination of public school attendance districts in a Pupil Placement Board and divested local school boards and officials of such power. This chapter requires the State Board of Education to promulgate regulations for use by local school boards in placing individual pupils in particular schools so as to provide for the "orderly administration of such schools, the competent instruction of the pupils enrolled and the health, safety, best interest and general welfare of such pupils," and empowers local school boards to place pupils in accordance with State Board regulations and to fix attendance areas and to adopt other pupil placement regulations not inconsistent with those of the State Board "as may be to the best interest of their respective school districts and the pupils therein." Procedures are set out for applying for placement in a particular school, seeking review by the local board, appealing to the State Board, and appealing to state circuit court. Chapter 71 is not to be effective in any locality until it elects to be bound by it in lieu of the 1956 Pupil Placement Act. Provision is made that if the Pupil Placement Act is adjudicated invalid, Chapter 71 shall be in force throughout the state, and that if any part of the Pupil Placement Act is adjudicated inapplicable to any locality, Chapter 71 shall be in force in that locality.

AN ACT to require the State Board of Education to adopt rules and regulations for the placement of pupils in the public schools; to provide that initial placement shall be made by local school boards; to provide for administrative procedure and remedies for pupils seeking enrollments; to provide for appeals to the State Board of Education; to provide for appeals to the courts of this State; and to provide the conditions under which this act shall be applicable in counties, cities and towns.

Be it enacted by the General Assembly of Virginia:

1. § 1. The State Board of Education shall promulgate rules and regulations to be used and applied by school boards in their respective jurisdictions in making placements of individual pupils in particular public schools so as to provide for the orderly administration of such schools, the competent instruction of the pupils enrolled and the health, safety, best interest and general welfare of such pupils.

§ 2. The placement of pupils in accordance with the rules and regulations adopted by the State Board of Education shall be made by school boards which are hereby authorized to fix attendance areas and adopt such other additional rules and regulations, not inconsistent with the rules and regulations of the State Board, relating to the placement of pupils as may be to the best interest of their respective school districts and the pupils therein.

§ 3. School boards are authorized to designate agents who may be division superintendents, or other school officials or employees, to make all initial placements in the manner required by this Act. All such placements must be made not later than April 15 preceding the school year to which placements are to be applicable and shall become final within ten days after notices thereof have been mailed to the last known address of the parents, guardians or other persons having custody of the pupils so placed and copies thereof delivered by mail, or otherwise, to the office of the principal of the school in which the pupil has been placed. The mailing of the notices of placement as required herein shall be prima facie evidence of receipt of same.

Parents, guardians or other persons having custody of pupils in the public school system are hereby required to notify their school board of any change of address or residence. The placement of any pupil whose parent, guardian or other person fails to so notify his board shall be final.

Any child who has not previously attended the public schools, any child whose residence has been moved from a county, city or town in which such child formerly attended school and any child who wishes to attend a school other than the school which he attended the preceding school year shall not be eligible for placement in a particular school unless application is made therefor, on or before April 5 preceding the school year to which the placement requested is to be applicable, by the parent, guardian or other person having custody of such child to the division superintendent having control of the school to which such child seeks admission. Such application shall be in writing on forms provided therefor by the State Board of Education and shall set forth the relationship of the applicant to the child and such other information as may be required by the State Board or requested by the school board. The action of the school board, or its representative, in making

the placement of any pupil, whose parent, guardian or other person having custody of such pupil fails to make application within the time required herein, shall be final.

§ 4. If any parent, guardian, or other person having custody of a pupil, shall feel aggrieved by the placement of such pupil in a particular school under the provisions of § 3 or § 10 of this act then such parent, guardian, or other person may, at any time prior to the placement becoming final, make application in writing to the school board for a review of such action, setting out therein the relationship of the applicant to the pupil and the specific reasons why such pupil should not attend the school in which placed and also setting out the particular reasons why such pupil should be placed in some other school to be named in such application. The school board shall review the initial placement within twenty days after receipt of such application for review. In making the review the school board shall have the authority to examine all records, files and other data pertinent to a consideration of the proper placement of the pupil involved, and shall have the further authority to require any person, including the applicant and the pupil, to appear and present evidence concerning the placement. The applicant shall be notified of the time and place of review and given the opportunity to appear if he so requests in his application. After review, the local board shall determine whether the placement sought in such application should be allowed and shall promptly enter an order either affirming the initial placement or changing the same. All such orders shall be entered on or before May 20 preceding the school year to which they are applicable and copies thereof furnished the applicants.

§ 5. The State Board of Education shall hear appeals taken under the subsequent provisions of this act with respect to the placement of pupils made by school boards and for that purpose is hereinafter sometimes referred to as the Board of Appeals. Whenever the words "Board of Appeals" are used in this act, they shall mean the State Board of Education.

The members of the State Board of Education shall receive as compensation for their services under the provisions of this act a per diem of twenty-five dollars for each day actually spent in the performance of such duties and shall be entitled to reimbursement for their necessary expenses incurred in connection therewith.

§ 6. The Board of Appeals may retain counsel and designate, appoint and employ such agents as it may deem desirable and necessary in the administration of its duties. It may designate any of its members or agents to hold the hearings hereinafter provided for and take testimony and submit recommendations in any and all cases referred to them by it. The Board of Appeals, or any member thereof, and any of its agents shall have authority to administer oaths to those who appear before it, any member thereof, or any of its agents in connection with the administration of its duties. The Board of Appeals, or any member thereof, and any of its agents shall also have the authority to issue subpoenas in the name of the Commonwealth to compel the attendance of witnesses and the production of documents. All such subpoenas shall be served by the sheriff, sergeant, constable, or any deputy thereof, of the county, city or town to which the same is directed. Should any person fail or refuse to obey any subpoena so issued, any court of record of the Commonwealth shall have jurisdiction, upon application of the Board of Appeals, a member thereof or its agent, to compel such person to appear before the Board of Appeals, or any member or agent, and give testimony or produce documents as ordered. Should any person fail or refuse to obey an order of the court issued in accordance with this section, he may be punished by the court issuing the same as for contempt thereof.

§ 7. For the conduct of hearings and to facilitate the performance of the duties imposed upon it, its members and agents under this act, the Board of Appeals is authorized to promulgate all such rules and regulations and procedures and prescribe such uniform forms as it deems appropriate and needful and to require strict compliance with the same by all persons concerned.

§ 8. If the parent, guardian, or other person having custody of a pupil who has been placed in a particular public school, or five interested heads of families as described in § 11 of this act, shall feel aggrieved by the final decision of the school board making such placement, such person or heads of families may at any time within ten days from the date of such final decision appeal therefrom to the Board of Appeals. Such appeal shall be by petition with copy thereof delivered to the clerk or chairman of the school board, alleging therein the decision complained

of and the objections thereto, and specifying the relief sought.

The Board of Appeals shall thereupon be charged with the duty of reviewing the placement made by the school board and of determining whether or not the petitioner is entitled to the relief requested.

Upon filing the petition for review, the Board of Appeals shall fix the time and place for hearing, which shall be held at Richmond, or a place reasonably accessible to the county, city or town in which the petitioner resides if so requested in the petition, and mail notices thereof to the petitioner and the school board. Upon receipt of a copy of the petition, the school board shall immediately certify to the Board of Appeals all records, exhibits and other information considered by it in making the final placement of the pupil concerned. The school board, or its representative, may appear at the hearing, and shall do so upon request of the Board of Appeals, and present such facts and information as may be deemed material for a proper review of the placement.

After consideration of the petition, the information furnished by the school board and the evidence adduced at the hearing, if any, the Board of Appeals shall determine the school in which the pupil should be placed and enrolled and enter an order accordingly. Such order shall be entered within thirty days from the date the petition was filed.

§ 9. If the parent, guardian, or other person having custody of the pupil, or five interested heads of families described in § 11 of this act, shall feel aggrieved by the final order of the Board of Appeals, such person or heads of families may at any time within ten days from the date of such order appeal therefrom to the circuit court of the county or corporation court of the city wherein such child resides. Such appeal shall be by petition against the Board of Appeals as defendant, alleging therein the order complained of and the objections thereto, and specifying the relief sought. Upon the filing of the petition for appeal the clerk of the court shall forthwith issue a summons returnable within twenty-one days. On or before the return day of such summons, the Board of Appeals may file its plea, demurrer, or answer to the allegations contained in the petition, but failure to do so shall not be taken as an admission of the truth of the facts set forth therein. The record on appeal shall consist of the petition to the

Board of Appeals and the order complained of duly certified by such board, which shall be filed with the clerk of the court on or before the return day of such summons. The case shall be matured for hearing upon the return date of such summons, and heard and determined *de novo* by the court without a jury, either in term or vacation.

If the decision of the court be that the order of the Board of Appeals shall be set aside, the court may adjudge that such pupil is entitled to attend the school as claimed in the petition to the Board of Appeals, or such other school as it may find such pupil is entitled to attend, and, in such case, such pupil shall be admitted to such school by the school board. From the final order of the court an appeal may be taken by either party to the Supreme Court of Appeals in the same manner as other appeals are taken from judgments in civil actions.

§ 10. Notwithstanding the requirements of § 3, any child whose residence is established in any county, city or town subsequent to March 5 preceding the school year in which he wishes to attend school shall make application to the school board for placement through his parent, guardian or other person having custody of such child within thirty days after such residence is established. The school board, or its designated agent, shall make the initial placement within 10 days after receipt of such application. Such application shall be in the same form as required by § 3 and the procedure to be followed, except insofar as altered by this section, shall be *mutatis mutandis* the same as prescribed by the preceding sections of this act.

The action of the school board, or its representative, in making the placement of any pupil, whose parent, guardian or other person having custody of such pupil fails to make application within the time required by this section, shall be final.

All final orders of school boards concerning applications for review of placements made by parents, guardians or other persons having custody of children whose residences are established in any county, city or town subsequent to March 5 preceding the school year in which they wish to attend school shall be entered within thirty days after receipt of such applications for review.

§ 11. Any five interested heads of families who are residents of the county, city or town and patrons of the public school involved in the

placement or placements required by this act, who may feel themselves aggrieved by the action of the school board, or any of its agents or representatives, in making the initial placement or placements required by this act, may apply for review within ten days from the date all placements must be made pursuant to provisions of § 3, or within ten days after the making of the initial placements under § 10, by making applications in writing to the school board setting forth the particular objections to the placement or placements involved. Upon receipt of such application, the school board shall review the placement or placements complained of in the same manner as is required by § 4. If the relief requested is not granted, a petition may be filed with the Board of Appeals and the circuit or corporation court, as the case may be, in the same manner as is provided in the case of an aggrieved parent, guardian or other person having custody of a pupil.

§ 12. In any case where schools are operated jointly by more than one political subdivision, any final placement must be approved by a majority of the school board if a single board has been formed pursuant to the provisions of Chapter 6 of Article 5 of Title 22 of the Code and if such single board has not been formed then such final placement must be approved by a majority of the members of each participating board, which said boards shall sit jointly but vote separately.

§ 13. This act shall not be applicable to or effective in any county, city or town, if such town be a separate school district, unless such county, city or town, elects to be bound by the provisions of this act in lieu of §§ 22-232.1 through 22-232.17 of the Code of Virginia as amended. Such election may be made from time to time by ordinance duly adopted by the governing body upon recommendation of the school board of the county, city or town to be affected thereby. In the event that §§ 22-232.1 through 22-232.17 should be finally adjudicated invalid by a court of competent jurisdiction, the provisions of the preceding sections of this act shall be in full force and effect throughout the State; and in the event that the provisions of §§ 22-232.1 through 22-232.17 or any part, sentence, clause or phrase, thereof, should be finally adjudicated inapplicable to the placement of pupils in public schools in any county, city or town, if such town be a separate school district, the provisions of the preceding sections

of this act shall be in full force and effect in such county, city or town.

§ 14. If any part or parts, section, subsection, sentence, clause or phrase of this act or the application thereof to any person or circumstance is for any reason declared unconstitutional, such decision shall not affect the validity of the remaining portions of this act which shall remain in force as if such act had been passed with the

unconstitutional part or parts, section, subsection, sentence, clause, phrase or such application thereof eliminated; and the General Assembly hereby declares that it would have passed this act if such unconstitutional part or parts, section, subsection, sentence, clause or phrase had not been included herein, or if such application had not been made.

2. This act shall become effective March 1, 1960.

EDUCATION

Public Schools—Virginia

Chapter 72 (House Bill 68) of the Acts of the 1959 Virginia General Assembly, approved April 28, 1959, requires that children of ages seven to sixteen regularly attend a public, private, or denominational school, or be taught by a qualified tutor, but it provides that the school board upon the recommendation of certain officials and with written parental or guardian consent should excuse from attendance at school "any pupil who in their or his judgment cannot benefit from education at such school," and that the school board shall excuse from attendance "any pupil whose parent [or] guardian . . . conscientiously objects to his attendance at such school as is available." The act states that it shall be in force in every locality upon recommendation by resolution by the local school board and adoption by the local governing body, but that the local governing body may suspend it in the same manner as local ordinances are repealed.

AN ACT to enable counties, cities and certain towns in certain cases and under certain circumstances to provide for the compulsory attendance of children between the ages of seven and sixteen upon the public schools of this State and to provide penalties for violations.

Be it enacted by the General Assembly of Virginia:

1. § 1. Every parent, guardian, or other person in the Commonwealth, having control or charge of any child, or children, who have reached the seventh birthday and have not passed the sixteenth birthday, shall send such child, or children, to a public school, or to a private, denominational or parochial school, or have such child or children taught by a tutor or teacher of qualification prescribed by the State Board of Education and approved by the division superintendent in a home, and such child, or children, shall regularly attend such school during the period of each year the public schools are in

session and for the same number of days and hours per day as in the public schools. The provisions of this section shall apply to any child or children who may be admitted to the primary grades in the public free schools of Virginia under the discretionary provision or § 22-218 of the Code.

§ 2. The period of compulsory attendance shall commence at the opening of the first term of the school which the pupil attends and shall continue until the close of such school for the school year or until the pupil reaches his or her sixteenth birthday.

§ 3. The provisions of this Act shall not apply to children physically or mentally incapacitated for school work, nor to those children suffering from contagious or infectious diseases while suffering from such diseases; nor to children under ten years of age who live more than two miles from a public school, unless public transportation is provided within one mile of the place where such children live; nor to children between ten and sixteen years of age who live

more than two and one-half miles from a public school, unless public transportation is provided within one and one-half miles of the place where such children live; nor to children excused under § 4 of this Act. Compulsory education distances shall be measured or determined by the nearest practical routes, which are usable for either walking or riding, from the entrance to the school grounds, or from the nearest school bus stop, to the residence of such children. Physical incapacity or disease shall be established by the certificate of a reputable practicing physician, made in accordance with the rules and regulations adopted by the State Board of Education, and mental incapacity is to be determined by such mental test or tests as may be prescribed by the State Board of Education.

§ 4. Notwithstanding the provisions of § 1 of this Act the school board shall on recommendation of the principal, the superintendent of schools and the judge of the juvenile and domestic relations court of such county or city, or on recommendation of the Superintendent of Public Instruction, excuse from attendance at school any pupil who in their or his judgment cannot benefit from education at such school, provided no such child shall be so excused unless the written consent of his parents or guardian be given; and provided further that notwithstanding any other provisions of this act, the school board shall excuse from attendance at school any pupil whose parent, guardian or other person having custody of such pupil conscientiously objects to his attendance at such schools as is available, when such fact is attested by the sworn statement of such parent, guardian or other person.

§ 5. Every blind or partially blind child and every deaf child between seven and sixteen years of age, shall attend some school for the blind, or some school for the deaf, or some class in the public schools wherein special methods are used and special equipment and instruction are provided for the blind or deaf for nine months, or during the scholastic year, unless it can be shown that the child is elsewhere receiving regularly equivalent instruction during the period in studies usually taught in the public schools to children of the same age, provided that the superintendent or principal of any school for the blind, or the public schools or the schools for the deaf, or person or persons duly authorized by such superintendents or principals, may excuse cases of necessary absence among its enrolled

pupils, and provided, further, that the provisions of this section shall not apply to a child whose physical or mental condition is such as to render its instruction as above described inexpedient or impracticable.

Any blind or partially blind or deaf child who prior to his sixteenth birthday has been regularly enrolled in some school for the blind or some school for the deaf or some class in the public schools wherein special methods are used and special equipment and instruction are provided for the blind or deaf, shall be required to continue attendance thereat until he reaches his twentieth birthday or until he has completed all courses offered by such school from which such child can benefit, unless it can be shown that such child is elsewhere receiving regularly equivalent instruction during the period in studies usually taught in the public schools.

§ 6. Every person having under his or her control a child between the ages above set forth, shall cause the child to attend school or receive instruction as required by this Act.

§ 7. Any person violating any of the preceding sections shall be guilty of a misdemeanor.

§ 8. Within ten days after the opening of the school, each principal teacher shall report to the division superintendent the names of the pupils enrolled in the school, giving age, grade and the name and address of parent or guardian.

§ 9. Within ten days after the opening of the school, each principal teacher shall submit another report to the division superintendent giving to the best of the principal teacher's information the names of all children not enrolled in school, with the name and address of parent or guardian, within the limits of the compulsory education requirements with regard to age and distance, according to the provisions of § 3.

§ 10. The division superintendent shall check these lists with the last school census and with reports from the Bureau of Vital Statistics. From these reports and from any other reliable source the superintendent shall within five days make a list of the names of children who are not enrolled in any school, and who are not exempt from school attendance. It shall be the duty of the division superintendent, or the attendance officer, if one be employed, to investigate all cases of nonenrollment and, when no valid reason is found therefor, to notify the parent, guardian or other person having control of the child, to require the attendance of such child at the school within three days from the date of such notice.

§ 11. A list of persons so notified shall be sent by the superintendent of schools, or the attendance officer, if there is one, to the principal teacher of the school. If the parent, guardian or other person having control of the child or children fails, within the specified time, to comply with the law, it shall be the duty of the division superintendent or the chief attendance officer, if there be one, to make complaint in the name of the Commonwealth before the juvenile and domestic relations court. In addition thereto, such child or children may be proceeded against as a neglected child or children in the manner provided by Title 63 of the Code.

§ 12. Any person who induces, or attempts to induce, any blind or partially blind child or a deaf child to absent himself unlawfully from school or employs or harbors any such child absent unlawfully from school, while the school is in session, shall be deemed guilty of a misdemeanor and shall, upon conviction thereof before a juvenile and domestic relations court, be fined a sum not exceeding ten dollars for each offense.

§ 13. The principal teacher of every public school in the counties and towns and the truant officers of the cities shall, within thirty days from the beginning of the school year, furnish the division superintendent and the county, city or town school board with the names of all children who are blind or partially blind or deaf between the ages of seven and sixteen years, inclusive, living within the boundaries of his or her school district who do not attend school. It shall be the duty of the school board to certify forthwith the names of all such deaf children to the respective superintendents of the State schools for the deaf, and of all such blind or partially blind children to the Virginia Commission for the Visually Handicapped and to the superintendents of the schools for the blind whose duty it shall be to investigate all cases of nonenrollment of such blind children, and when no valid reason is found therefor, such child or children shall be required to attend school as provided in § 5.

§ 14. For the practical interpretation of the preceding sections of this Act a definition of a blind or partially blind child is as follows: A blind child is a child who has, with correcting glasses, twenty-two hundred vision or less, in the better eye. A partially blind child is a child who has twenty-seventy vision or less, in the better eye, or one who has some progressive eye trouble which in the opinion of a competent

ophthalmologist makes it necessary for the child to attend a special school or a special class in the public schools.

§ 15. Every teacher in every school in the Commonwealth shall keep an accurate daily record of attendance of all children between seven and sixteen years of age. Such record shall, at all times, be open to any officer authorized to enforce the provisions of this Act who may inspect or copy the same, and shall be admissible in evidence in any prosecution for a violation of this Act, as prima facie evidence of the facts stated therein.

§ 16. Every county school board and school board of a city or town shall have power to appoint, with the approval of its division superintendent of schools, one or more attendance officers who shall be primarily charged with the enforcement of the preceding sections of this Act, and for such purpose only, provided that, in a county, city or town where no attendance officer is appointed by the local school board, the division superintendent of school shall act as attendance officer with the same powers conferred on attendance officers.

§ 17. Such attendance officers shall have the powers and authority of a sheriff. The compensation of such attendance officers, or of the division superintendent of schools, when he acts as such, shall be fixed by the school boards and paid out of funds available to the school board for public schools. Every attendance officer shall keep an accurate record of all notices served, of cases prosecuted and all other services performed, and shall make an annual report of the same to the board appointing him.

§ 18. Any parent, guardian, or other person who makes a false statement concerning the age of a child between the ages of seven and sixteen years, for the purpose of evading the provisions of this Act, shall be guilty of a misdemeanor.

§ 19. Any person who induces or attempts to induce any child to be absent unlawfully from school, or who knowingly employs or harbors, while school is in session, any child absent unlawfully, shall be guilty of a misdemeanor.

§ 20. Any child or children permitted by any parent, guardian, or other person having control thereof, to be habitually absent from school, contrary to the provisions of this Act, shall be deemed a neglected child, to be disposed of in the manner prescribed by Title 63 of the Code.

§ 21. It shall be the duty of the attorneys for the Commonwealth of the several counties and

cities to prosecute all cases arising under this Act and juvenile and domestic relations courts shall have exclusive original jurisdiction for the trial of such cases.

§ 22. When it is found upon investigation that the parent, guardian or other person having control of a child is unable to provide the necessary clothes in order that the child may attend school, such parent, guardian or other person shall not be punished, unless the local board of public welfare, from public funds or otherwise, or some other agency or person, furnish such child with the necessary clothes, and thereafter such parent, guardian or other person fails to send such child or children, to school, as required by law.

§ 23. The State Board of Education shall have the authority and it shall be its duty to see that the compulsory attendance laws, as provided in this Act, are properly enforced in those counties, cities and towns wherein this Act is in force.

§ 24. This Act shall be in force in every county, city or town, if such town be a separate school district, when it has been recommended by resolution of the county, city or town school board and duly adopted by the governing body of such county, city or town in the same manner as local ordinances are adopted. The operation

of this Act may be suspended in any county, city or town, if such town be a separate school district, by the governing body thereof in the same manner as local ordinances are repealed.

§ 25. In any case where schools are operated jointly by more than one political subdivision, any resolution adopted pursuant to the authority of this Act must be approved by a majority of the school board if a single board has been formed pursuant to the provisions of Chapter 6, Article 5, Title 22 of the Code and if such single board has not been so formed then by a majority of the members of each participating board, which said boards shall sit jointly but vote separately.

§ 26. If any part, section, sentence, clause or phrase of this Act, or the application thereof to any person or circumstances, when it becomes in full force and effect in any county, city or town as provided herein, shall for any reason be adjudged to be invalid the remainder shall be inoperative; and the General Assembly hereby declares that it would not have passed this Act if such invalid part, section, paragraph, sentence, clause or phrase had not been included therein, or if such application had not been made.

2. All acts and parts of acts inconsistent with the provisions of this Act are hereby repealed.

EDUCATION Public Schools—Virginia

Chapter 79 (Senate Bill 27) of the Acts of the 1959 Virginia General Assembly, approved April 28, 1959, requires that claims against, warrants issued by, and disbursements in behalf of a local school board shall be payable only from funds made available to the school board; provides for appropriating funds and levying taxes for public school and for educational expenses by local governmental units; requires each county superintendent to prepare and submit with the school board's approval an estimate of money needed for public schools and for educational purposes, such estimates to be included in the county budget for fiscal and planning purposes only; and repeals various statutes dealing with school finance.

AN ACT to amend and reenact §§ 22-55, 22-60 as amended, 22-72 as amended, 22-73, 22-78, 22-97 as amended, 22-126 as amended, 22-127 as amended, 22-128 as amended, 22-130, 22-132, 22-133 and 22-141 as amended, of the Code of Virginia, relating to management and control of funds made available to school boards,

auditing and approving claims and issuing warrants by school boards, levies and appropriations for school purposes, including capital expenditures, indebtedness, and rents, custody and disbursement of local school funds, and town school districts' share of county school funds, to provide claims against,

warrants issued by, and disbursements on behalf of the school board of a county, city, or town shall only be payable out of funds made available to the school board, to provide for the appropriation of funds for public school and for educational purposes, annually, semi-annually, quarterly, or monthly, the levying of taxes for public school purposes by counties, cities, and towns, including for capital expenditures, indebtednesses, and rents, to add to the Code of Virginia new Sections numbered 22-120.3, 22-120.4, and 22-120.5 to provide the superintendent shall prepare and submit with the approval of the school board an estimate of the amount of money deemed to be needed for public schools and in the alternative an estimate of the money deemed to be needed for educational purposes, the inclusion of such estimates in the county budget for informative and fiscal planning purposes only, the request for funds for public schools and for educational purposes; to repeal, with certain exceptions as to certain litigation, §§ 22-121, 22-122, 22-123, 22-124, 22-125, 22-127.1, 22-129, 22-131, 22-139, and 22-139.1 of the Code of Virginia, and all amendments thereof, relating to budgets, estimates, and requests for funds needed for school purposes, the decreasing of appropriations for public schools during a school term, to referendum in a county, city, or town in event the governing body refuses to lay such levy or make such appropriation as is requested by the division superintendent, the cessation of expenditures on local school funds on direction of the governing body, town levies for school purposes, assessment of taxes for public school purposes, apportionment of state school funds, and additional funds for school purposes from local school taxes; and to validate certain acts.

Be it enacted by the General Assembly of Virginia:

1. That §§ 22-55, 22-60 as amended, 22-72 as amended, 22-73, 22-78, 22-97 as amended, 22-126 as amended, 22-127 as amended, 22-128 as amended, 22-130, 22-132, 22-133, and 22-141 as amended, of the Code of Virginia, be amended and reenacted, and §§ 22-120.3, 22-120.4, and 22-120.5 be added to the Code as follows:

§ 22-55.—The school board of any county, city or town, or any two or more of such school

boards acting in conjunction, may establish and operate or cause to be established and operated, for the benefit of children of school age, vacation schools or camps for the advancement of education, physical training, health, nutrition, the prevention of communicable diseases, or for any other purpose deemed by such board or boards beneficial to children of school age requiring special training or attention or which will promote the efficiency of their respective school systems. Such school board or boards may provide and appropriate such sum or sums as may be reasonable and requisite for such purposes; or may appropriate such sum or sums and permit the proper use of any school property, under reasonable safeguards, toward the establishment and operation of such vacation school or camp conducted under the auspices and supervision of any other governmental agency approved by such school board or boards, for the benefit of children of school age within the jurisdiction of such board or boards; provided, such * *activity* shall have been included in the * *estimate of money deemed to be needed for public schools* for the year in which such appropriation may be made, and provided, further, that the establishment and operation of such school or camp shall be approved, as to conditions affecting sanitation and safety, by the health authorities having jurisdiction of the area in which such vacation school or camp is located and conducted.

§ 22-60.—In each county there shall be a board, to be known as the school trustee electoral board, which shall be composed of three resident qualified voters, who are not county or State officers, to be appointed by the circuit court of each county, or the judge in vacation, within thirty days after the first day of July, nineteen hundred and fifty and every four years thereafter. The members of the trustee electoral board shall each receive a per diem of ten dollars for each day actually employed, to be paid out of the * *funds made available to the school board*. Any vacancy occurring within the terms of the appointees shall be filled by the circuit court, or by the judge in vacation, within thirty days thereafter. No person employed by, or paid from, public school funds in whole or in part shall be eligible to serve on such trustee electoral board.

§ 22-72.—The school board shall have the following powers and duties:

(1) Enforcement of school laws.—To see that the school laws are properly explained, enforced and observed.

(2) Rules for conduct and discipline.—To make local regulations for the conduct of the schools and for the proper discipline of the students, which shall include their conduct going to and returning from school, but such local rules and regulations shall be in harmony with the general rules of the State Board and the statutes of this State.

(3) Information as to conduct.—To secure, by visitation or otherwise, as full information as possible about the conduct of the schools.

(4) Conducting according to law.—To take care that they are conducted according to law and with the utmost efficiency.

(5) Payment of teachers and officers.—To provide for the payment of teachers and other officers on the first of each month, or as soon thereafter as possible.

(6) School buildings and equipment.—To provide for the erecting, furnishing, and equipping of necessary school buildings and appurtenances and the maintenance thereof.

(6a) Insurance.—To provide for the necessary insurance on school properties against loss by fire or against such other losses as deemed necessary.

(7) Drinking water.—To provide for all public schools an adequate and safe supply of drinking water and see that the same is periodically tested and approved by or under the direction of the State Board of Health, either on the premises or from specimens sent to such board.

(8) Textbooks for indigent children.—To provide such textbooks as may be necessary for indigent children attending public schools.

(9) Costs and expenses.—In general, to incur costs and expenses, but only the costs and expenses of such items as are provided for in its ** estimates submitted to the tax levying body* without the consent of the tax levying body.

(10) Consolidation of schools.—To provide for the consolidation of schools whenever such procedure will contribute to the efficiency of the school system.

(11) Other duties.—To perform such

other duties as shall be prescribed by the State Board or as are imposed by law.

§ 22-73.—The school board shall receive and audit all claims arising from commitments made pursuant to the provisions of §§ 22-71 to 22-78 and by resolution or recorded vote, to approve and issue warrants on the county treasurer *payable out of funds made available to the school board for public schools* in settlement of those of such claims ** as are found to be valid.*

§ 22-78.—The school board may provide, by resolution, for the drawing of special warrants on the county treasurer, payable out of the ** funds made available to the school board for public schools* in payment of compensation, when such compensation has been earned and is due, for (1) all employees and school bus operators under written contract, and (2) upon receipt of certified time sheets or other evidence of service performed, the payment of all other employees whose rates of pay have been established by the school board or its properly delegated agent, and (3) for payment on contracts for school construction projects according to the terms of such contracts. All such special warrants so authorized shall be signed by the clerk or deputy clerk of the school board and countersigned by the division superintendent of schools or the chairman or vice chairman of the school board, provided, however, that when the division superintendent and clerk is one and the same person such special warrants shall be countersigned by such chairman or vice chairman. Any special warrant may be converted to a negotiable check in the manner provided in § 22-76.

Such payrolls and contracts so paid shall be reviewed and approved by the school board at its next regular meeting.

§ 22-97. The city school board shall have the following powers and duties:

(1) Rules and regulations.—To explain, enforce, and observe the school laws, and to make rules for the government of the schools, and for regulating the conduct of pupils going to and returning therefrom.

(2) Method of teaching and government employed.—To determine the studies to be pursued, the methods of teaching, the government to be employed in the schools, and the length of the school term.

(3) Employment and control of teachers.—To employ teachers on recommendation of the division superintendent and to dismiss them when delinquent, inefficient or in anywise unworthy of the position; provided, that no school board shall employ or pay any teacher from the public funds unless the teacher shall hold a certificate in full force, according to the provisions of §§ 22-203 to 22-206. It shall also be unlawful for the school board of any city, or any town constituting a separate school district, to employ or pay any teacher or other school employee related by consanguinity or affinity as provided in § 22-206. The exceptions and other provisions of that section shall apply to this section.

(4) Suspension or expulsion of pupils.—To suspend or expel pupils when the prosperity and efficiency of the school make it necessary.

(5) Free textbooks.—To decide what children, wishing to enter the schools of the city, are entitled by reason of poverty of their parents or guardians to receive textbooks free of charge, and to provide for supplying them accordingly.

(6) Establishment of high and normal schools.—To establish high and normal schools and such other schools as may, in its judgment, be necessary to the completeness and efficiency of the school system.

(7) Census.—To see that the census of children required by § 22-223 is taken within the proper time and in the proper manner.

(8) Meetings of board.—To hold regular meetings and to prescribe when and how special meetings may be called.

(9) Meetings of people.—To call meetings of the people of the city for consultation in regard to the school interests thereof, at which meetings the chairman or some other member of the board shall preside if present.

(10) School houses and property.—To provide suitable schoolhouses, with proper furniture and appliances, and to care for, manage, and control the school property of the city. For these purposes it may lease, purchase, or build such houses according to the exigencies of the city and the means at its disposal. No schoolhouse shall be contracted for or erected until the plans there-

for shall have been submitted to and approved in writing by the division superintendent of schools, and no public school shall be allowed in any building which is not in such condition and provided with such conveniences as are required by a due regard for decency and health; and when a schoolhouse appears to the division superintendent of schools to be unfit for occupancy, it shall be his duty to condemn the same, and immediately to give notice thereof, in writing, to the chairman of the school board, and thenceforth no public school shall be held therein, nor shall any part of the State or city fund be applied to support any school in such house until the division superintendent shall certify, in writing, to the city school board that he is satisfied with the condition of such building, and with the appliances pertaining thereto.

(11) Visiting schools.—To visit the public free schools within the city, from time to time, and to take care that they are conducted according to law, and with the utmost efficiency.

(12) Management and control of * funds.—To manage and control the * funds of the city *made available to the school board for public schools*, to provide for the pay of teachers and of the clerk of the board, for the cost of providing schoolhouses and the appurtenances thereto and the repairs thereof, for school furniture and appliances, for necessary text books for indigent children attending the public free schools, and for any other expenses attending the administration of the public free school system, so far as the same is under the control or at the charge of the school officers.

(13) Approval and payment of claims.—To examine all claims against the school board, and when approved, to order or authorize the payment thereof. A record of such approval, order or authorization shall be made in the proceedings of the board. Payment of each claim shall be ordered or authorized by a warrant drawn on the treasurer or other officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds *made available to the school board of such city*. The warrant shall be signed by the chairman or vice chairman of the board and countersigned by the clerk or deputy

clerk thereof, payable to the person or persons, firm or corporation entitled to receive such payment. There shall be stated on the face of the warrant the purpose or service for which such payment is drawn and also that such warrant is drawn pursuant to an order entered or authority granted by the board on theday of The warrant may be converted into a negotiable check when the name of the bank upon which the funds stated in the warrant are drawn or by which the check is to be paid is designated upon its face and is signed by the treasurer, deputy treasurer or other officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds of the city.

The board may, in its discretion, appoint an agent and a deputy agent to act for the agent in his absence or inability to perform this duty by resolution spread upon the record of its proceedings to examine and approve such claims and, when approved by him or his deputy to order or authorize the payment thereof. A record of such approval, order or authorization shall be made and kept with the records of the board. Payment of each such claim so examined and approved by such agent or his deputy shall be ordered or authorized by a warrant drawn on the treasurer or other officer of the city charged by law with the responsibility for the receipt, custody, and disbursement of the funds *made available to the school board* of the city. The warrant shall be signed by such agent or his deputy and countersigned by the clerk or deputy clerk of the board, payable to the person or persons, firm or corporation entitled to receive such payments; provided, however, that when the agent appointed by the board is the division superintendent of schools and the division superintendent and clerk is one and the same person, all such warrants shall be countersigned by the chairman or vice chairman of the board; provided further that when the deputy agent and deputy clerk is one and the same person the warrant shall be countersigned by either the clerk or the agent of the board. There shall be stated on the face of the warrant the purpose or service for which such payment is made and also that such warrant is drawn

pursuant to authority delegated to such agent or his deputy by the board on theday of The warrant may be converted into a negotiable check in the same manner as is prescribed herein for warrants ordered or authorized to be drawn by the school board. The board shall require such agent and his deputy to furnish the city a corporate surety bond conditioned upon the faithful performance and discharge of the duties herein assigned to each such official. The board shall fix the amount of such bond or bonds and the premium therefor shall be paid out of the * funds *made available to the school board* of such city.

(14) Report of expenditures and estimate of necessary funds.—It shall be the duty of the school board of every city, once in each year, and oftener if deemed necessary, to submit to the council, in writing, a classified report of all expenditures and a classified estimate of * funds * *deemed to be needed for the proper maintenance and growth of the public schools of the city, and to request the council to make provisions by appropriation or levy pursuant to § 22-126, for the same.*

(15) Other duties prescribed by State Board.—To perform such other duties as shall be prescribed by the State Board or are imposed by other parts of this title.

(16) Acquisition of land.—City school boards shall, in general, have the same power in relation to the condemnation or purchase of land and to the vesting of title thereof, and also in relation to the title to and management of property of any kind applicable to school purposes, whether heretofore or hereafter set apart therefor, and however set apart, whether by gift, grant, devise, or any other conveyance and from whatever source, as county school boards have in the counties, and in addition thereto, they shall have the further right and power to condemn not in excess of fifteen acres of land for any one school when necessary for school purposes, except that when dwellings or yards are invaded no more than five acres may be condemned for any one school.

(17) Consolidation of schools.—To provide for the consolidation of schools when-

ever such procedure will contribute to the efficiency of the school system.

§ 22-120.3.—*It shall be the duty of the division superintendent of schools, on or before the first day of May, 1959, and on or before the first day of April of each year thereafter, to prepare, with the advice of the school board, and submit to the governing body of the county, city, or town, if the town be a separate school district, two estimates. The first estimate shall show the amount of money deemed to be needed during the next scholastic year, for the support of the public schools of the county, city, or town. The second estimate shall show, in the alternative, the amount of money deemed to be needed for educational purposes for the county, city, or town.*

§ 22-120.4.—*On the basis of the two estimates, the division superintendent of schools shall request the governing body of the county, city, or town to fix such levy, or make such appropriations as will provide an amount of money deemed to be needed for the operation of the public schools, or will provide an amount of money deemed to be needed for the educational purposes of such county, city, or town.*

§ 22-120.5.—*The board of supervisors shall include in the county budget, prepared for informative and fiscal planning purposes only, an estimate of the amount of money deemed by the school board to be needed for the public schools of the county, or in the alternative, an estimate of the funds deemed by the school board to be needed for educational purposes. The board of supervisors may, in its discretion, include and publish in the county budget both alternative estimates. The two estimates so prepared shall be submitted to and approved by the school board prior to submission to the tax levying body. The estimate of the amount of money deemed to be needed for support of public schools shall set up the amount of money deemed to be needed for overhead charges, for instruction, for operation, for maintenance, for a reserve fund to purchase new school buses to replace obsolete or worn out equipment, for auxiliary agencies, for miscellaneous, and for permanent capitalization and such other headings or items as may be necessary. The alternative estimate of the amount of money deemed to be needed for educational purposes shall show the number of children who reside in the*

county, city, or town between the ages of six and twenty years multiplied by the expected average cost per child to the county, city, or town and a sum sufficient for debt service.

§ 22-126.—*Each county, * city, and town if the town be a separate school district, is authorized to raise sums of money by a tax on all property, subject to local taxation, at such rate as may be deemed sufficient, but in no event more than three dollars on the one hundred dollars of the assessed value of the property in any one year to be expended by the local school authorities in establishing, maintaining and operating such schools as in their judgment the public welfare requires and in payment of * scholarships for the furtherance of elementary or secondary education and transportation costs as required or authorized by law; provided that in counties with a population of more than six thousand four hundred but less than six thousand five hundred, such rate may be increased to four dollars on the one hundred dollars of the assessed value of the property therein in any one year; and provided further that in counties having a population of more than thirty-seven thousand but less than thirty-nine thousand such rate may be increased to four dollars on the one hundred dollars of the assessed value of the property therein in any one year.*

§ 22-127. * *The governing body of any county, * city, or town if the town be a separate school district, may, in its discretion, make a cash appropriation, * either annually, semi-annually, quarterly, or monthly, from the funds derived from the general county, * city, or town levy * and from any other funds available, of such sums as in its judgment may be necessary or expedient for the establishment, maintenance and operation of * public schools, * and/or for educational purposes.*

§ 22-128. *For capital expenditures and for the payment of indebtedness or rent, the governing body of any county, city * or town if the town be a separate school district, may levy a special county tax, a special district tax, or a special city tax, or a special town tax, as the case may be, on all property subject to local taxation, such levy or levies to be at such rate or rates as the governing body levying the tax may deem necessary for the purpose or purposes for which levied, except that where the tax is for raising*

funds for capital expenditures the rate shall not be more than two dollars and fifty cents on the one hundred dollars of the assessed value of the property in any one year; *provided that there may be exempted from such taxes for debt service on Literary Fund Loan or other loan for capital outlay, property located in a special town school district which levies its own taxes for debt service and capital outlay.*

§ 22-130.—Nothing contained in §§ 22-126 * through 22-128 shall be construed as raising or abrogating any maximum tax rate limit provided in any city charter.

§ 22-132.—All funds both State and local * made available to the school board for * public school and/or educational purposes in each city shall be * recorded by the treasurer or other officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds of the city * in an account or accounts separate and distinct from all other funds. Such school funds shall be disbursed upon the order or authority of the school board of the city.

§ 22-133.—All funds made available to the school board for public school and/or educational purposes in the counties, both State and local shall be handled by the county treasurer and paid out in the same manner as other county funds are paid out by him under the provisions of § 58-951.

§ 22-141.—(a) Funds to be paid by county treasurer to town treasurer.—For the benefit of each town school district operated by a school board of three members, the county school board shall require the county treasurer to pay over to the town treasurer, if and when properly bonded, the following funds to be used for public school and/or educational purposes within such special town school district:

(1) From the amount derived from * a county school levy and/or appropriations for public school and/or educational purposes, a sum equal to the pro rata amount from such levy or appropriations derived from such town.

(2) The amount due from State school funds received by the county for general school purposes, to be determined as between the county and the town on the same basis of distribution used by the State

in making the distribution of such school funds to the counties and cities.

(3) The amounts due from the county to such special town school district from special State school funds to be determined in accordance with the purposes for which the allocations are made.

(4) From federal funds allocated to and received by the county on the basis of federally connected pupils for operations and/or capital outlay purposes, to be apportioned between the county and the town on the same basis of distribution as used in making the allotment of such federal funds to the county and in the ratio that such federally connected pupils residing in the town bear to the total of such federally connected pupils residing in the county including the town and which were included in the county's application for such federal funds.

(b) District located in adjoining counties.—Where a special town school district is located partly in each of two adjoining counties and operated by a town school board created or constituted by the charter of such town, for the benefit of such town school district, each county school board shall require each respective county treasurer to pay over to the town treasurer, if and when properly bonded, the following funds to be used for public school and/or educational purposes within such special town school district:

(1) From the amount derived from * a county school levy and/or appropriations in each respective county for public school and/or educational purposes, a sum equal to the pro rata amount from such levy or appropriations derived from such town.

(2) The amount due from State school funds received by each county for general school purposes, to be determined as between each county and the town on the same basis of distribution used by the State in making the distribution of such school funds to the counties and cities.

(3) The amounts due from each county to such special town school district from special State school funds to be determined in accordance with the purposes for which the allocations are made.

(c) State funds from special sources.—None of the provisions of this section shall

require the county treasurer to pay over to the town treasurer of a special town school district any funds received from the State from special sources, including funds distributed to the localities from the profit realized from the operation of the State alcoholic beverage control system, when said town has received direct appropriations or allocations from the State from the same special sources.

(d) Sections not amended or repealed.—None of the provisions of this section or §§ 22-42, 22-43, 22-60, 22-67 and 22-99 shall be construed to amend or repeal the provisions of §§ 15-292 and 15-324.

2. That all acts heretofore done under §§ 22-124, 22-127 before the amendment by this act,

and § 22-127.1 of the Code of Virginia, are hereby validated.

3. That §§ 22-121, 22-122, 22-123, 22-124, 22-125, 22-127.1, 22-129, 22-131, 22-139 and 22-139.1 of the Code of Virginia, and all amendments thereof be, repealed; provided that the repeal of said §§ 22-124 and 22-127.1 shall not be operative as to pending litigation wherein the right of a local governing body to make tentative appropriation or to terminate an appropriation already made, pursuant to §§ 22-124, 22-127 before amendment by this act, or § 22-127.1 is in issue, but these sections shall continue in force, anything herein to the contrary notwithstanding.

4. An emergency exists and this Act is in force from its passage.

EDUCATION

Public Schools—Virginia

Chapter 81 (Senate Bill 33) of the Acts of the 1959 Virginia General Assembly, approved April 28, 1959, re-enacts a 1958 statute [Va. Code Ann. § 22-219 (Supp. 1958)], which transferred a power previously held by the State Board of Education to local school boards to make regulations whereby state residents not residing locally might attend school and granted additional power to charge such persons tuition, and amends the same statute to place certain restrictions upon the determination of tuition charges. (The new language appears below in *italics*). Chapter 81 also repeals statutory provisions relating to tuition charges to children attending high schools.

AN ACT to amend and reenact § 22-219, as amended, of the Code of Virginia, relating to the attendance of children residing in the State in the public schools of a county, city, or town in which such children do not reside, so as to provide that the tuition charged for attendance shall not exceed the per capita cost of education, exclusive of capital outlay and debt service, except where the tuition charge is payable by the school board of the county, city or town of the pupil's residence; and to repeal §§ 22-194 and 22-196 of the Code, relating to tuition charges to children attending high schools.

Be it enacted by the General Assembly of Virginia:

1. That § 22-219, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 22-219. The school board of each county,

city or town operating as a separate school district shall have the power to make regulations whereby persons other than those defined in § 22-218 who are residents of the State of Virginia may attend school in such county, city or town, and may charge tuition for the attendance of such persons in such schools, *provided, however, that the tuition charge for any such person shall not exceed the total per capita cost of education, exclusive of capital outlay and debt service, for high school or elementary pupils, as the case may be, of such county, city or town, except in cases where the tuition charge is payable by the school board of the county, city or town of the pupil's residence pursuant to a contract entered into between the school board of the two localities, in which case the tuition charge shall be that fixed by such contract.*

2. That §§ 22-194 and 22-196 of the Code are hereby repealed.

CIVIL RIGHTS State Action—Kansas

House Bill No. 467 of the 1959 Session of the Kansas legislature amends 1949 statutes by making it a misdemeanor for persons in charge of state educational institutions, owners or managers of hotels, restaurants, and places of public amusement, for which a municipal license is required, and owners or persons in charge of public transportation facilities, to make any distinction on account of race, color, religion, national origin or ancestry.

AN ACT relating to civil rights, making it a misdemeanor to deny certain rights on account of race, color, religion, national origin or ancestry, and prescribing penalties for violations thereof; amending section 21-2424 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. Section 21-2424 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 21-2424. If any of the regents or trustees of any state university, college, or other school of public instruction, or the state superintendent, or the owner or owners, agents, trustees or managers in charge of any hotel, as defined in section 36-101 of the General Statutes Supplement of 1957, or acts amendatory thereof, or any restaurant, as defined in section 36-301

of the General Statutes Supplement of 1957, or acts amendatory thereof, or any place of public entertainment or public amusement, for which a license is required by any of the municipal authorities of this state, or the owner or owners or person or persons in charge of any railroad, bus, streetcar, or any other means of public carriage of persons within the state, shall make any distinction on account of race, color, religion, national origin or ancestry, the person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined in any sum not more than one thousand dollars (\$1,000).

Sect. 2. Section 21-2424 of the General Statutes of 1949 is hereby repealed.

Sect. 3. This act shall take effect and be in force from and after its publication in the statute book.

ELECTIONS Registration—Alabama

Act No. 54 (Senate Bill 18) of the 1959 special session of the Alabama Legislature, approved February 24, 1959, amends a statute concerning examinations of applicants for registration to vote (1) to provide that the questionnaires and written answers of such applicants shall not become "public records," as that term is defined by Alabama law; (2) to prohibit boards of registrars from disclosing the information contained in such documents "except with the written consent of the person who filed the answer or pursuant to the order of a court of competent jurisdiction in a proper proceeding"; (3) to require boards of registrars to keep such documents for thirty days after denial, after which, if no appeal has been taken, they are authorized to be kept with the board's records or "disposed of in such manner as the board may direct." The amended statute appears below with new language italicized.

AN ACT to amend further Section 31 of Title 17, Code of Alabama 1940, relating to examinations of applicants to register.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 31, Title 17, Code of Ala-

bama 1940, as amended by Act No. 754, Acts of 1953, is amended further to read as follows:

"Section 31. The board or registrars shall have power to examine, under oath or affirmation, all applicants for registration, and to take testimony touching the qualifica-

tions of such applicants. In order to aid the registrars to judicially determine if applicants to register have the qualifications to register to vote, each applicant shall be furnished by the board a written questionnaire, which shall be uniform in all cases with no discrimination as between applicants, the form and contents of which questionnaire shall be prescribed by the Supreme Court of Alabama and be filed by such court with the Secretary of State of the State of Alabama. The questionnaire shall be so worded that the answers thereto will place before the registrars information necessary or proper to aid them to pass upon the qualifications of each applicant. The questionnaire shall be answered in writing by the applicant, in the presence of the board without assistance. There shall be incorporated in such answer an oath to support and defend the constitution of the United States and the constitution of the State of Alabama and a statement in such oath by the applicant disavowing belief in affiliation at any time with any group or party which advocated the overthrow of the government of the United States or the state of Alabama by unlawful means. The answers and oath shall be duly signed and sworn to by the applicant before a member of the board.* If solely because of physical handicaps the applicant is unable to read or

write, then he shall be exempt from the above stated requirements which he is unable to meet because of such physical handicap, and in such cases a member of the board shall read to the applicant the questionnaire and oath herein provided for and the applicant's answers thereto shall be written down by such board member; and the applicant shall be registered as a voter if he meets all other requirements herein set out. Each member of the board is authorized to administer the oaths to be taken by applicants and witnesses. *The questionnaires and written answers of persons applying for registration shall not become public records as public records are defined under the laws of the state of Alabama, nor shall the board disclose the information contained in such questionnaires and written answers, except with the written consent of the person who filed the answer or pursuant to the order of a court of competent jurisdiction in a proper proceeding. Such questionnaires and the answers of applicants shall be preserved by the board for a period of thirty days, after denial after which, if no appeal has been taken as provided in section thirty-five of this title, they shall be kept with the records of the board of registrars or disposed of in such manner as the board may direct.*

Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

* Sentence deleted here which read: "Such questionnaire and the written answers of the applicant thereto shall be filed with the recorder of the board of registrars."

EMPLOYMENT

Fair Employment Laws—California

Chapter 121 of the 1959 Acts of the California Legislature (Assembly Bill No. 91), approved April 16, 1959, makes unlawful certain discriminatory practices in employment, creates a State Commission on Fair Employment Practices, and defines the Commission's functions, powers and duties.

Assembly Bill No. 91

CHAPTER 121

AN ACT to add Part 4.5 (commencing with Section 1410) to Division 2 of, and to amend

Section 56 of, the Labor Code, relating to prevention and elimination of practices of discrimination in employment and otherwise against persons because of race, religious creed, color, national origin, or ancestry, creat-

ing a State Commission on Fair Employment Practices, defining its functions, powers and duties, providing for the appointment and compensation of its officers and employers.

The people of the State of California do enact as follows:

Section 1. Part 4.5 (commencing with Section 1410) is added to Division 2 of the Labor Code, to read:

PART 4.5. FAIR EMPLOYMENT PRACTICES

1410. This part may be referred to as the "California Fair Employment Practice Act."

1411. It is hereby declared as the public policy of this State that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, or ancestry.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons, foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public in general.

This part shall be deemed an exercise of the police power of the State for the protection of the public welfare, prosperity, health, and peace of the people of the State of California.

1412. The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, or ancestry is hereby recognized as and declared to be a civil right.

1413. As used in this part:

(a) "Person" includes one or more individuals, partnerships, associations or corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(b) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(c) "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(d) "Employer," except as hereinafter provided, includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the State or any political or civil subdivision thereof and cities.

"Employer" does not include a social club, fraternal, charitable, educational or religious association or corporation not organized for private profit.

"Employer" does not include a person with respect to the person's employment of agricultural workers residing on the land where they are employed as farm workers.

(e) "Employee" does not include any individual employed by his parents, spouse or child, or in the domestic service of any person in his home; and it does not include agricultural workers residing on the land where they are employed as farm workers.

(f) "Commission," unless a different meaning clearly appears from the context, means the State Fair Employment Practice Commission created by this part.

1414. There is in the Division of Fair Employment Practices the State Fair Employment Practice Commission. Such commission shall consist of five members, to be known as commissioners, who shall be appointed by the Governor, by and with the advice and consent of the Senate, and one of whom shall be designated as chairman by the Governor. The term of office of each member of the commission shall be for four years; provided, however, that of the commissioners first appointed two shall be appointed for a term of one year, one for a term of two years, one for a term of three years, and one for a term of four years.

1415. Any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the unexpired term of the member whom he is to succeed. Three members of the commission shall constitute a quorum for the purpose of conducting the business thereof.

The Governor shall also appoint a Chief of the Division of Fair Employment Practices, who shall be the principal executive officer of the commission.

1416. Each member of the commission shall serve without compensation but shall receive fifty dollars (\$50) for each day actually spent in the performance of his duties under this part and shall also be entitled to his expenses actually

and necessarily incurred by him in the performance of his duties.

1417. Any member of the commission may be removed by the Governor for inefficiency, for neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon.

1418. The commission shall formulate policies to effectuate the purposes of this part and may make recommendations to agencies and officers of the state and local governments in aid of such policies and purposes.

1419. The commission shall have the following functions, powers and duties:

(a) To establish and maintain a principal office and such other offices within the State as the Legislature authorizes.

(b) To meet and function at any place within the State.

(c) To appoint an attorney, and such clerks and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(d) To obtain upon request and utilize the services of all governmental departments and agencies.

(e) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this part.

(f) To receive, investigate and pass upon complaints alleging discrimination in employment because of race, religious creed, color, national origin or ancestry.

(g) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the commission.

(h) To create such advisory agencies and conciliation councils, local or otherwise, as in its judgment will aid in effectuating the purposes of this part, and may empower them to study the problems of discrimination in all or specific fields of human relationships or in specific instances of discrimination because of race, religious creed, color, national origin, or ancestry, and to foster through community effort or otherwise good will, cooperation, and con-

ciliation among the groups and elements of the population of the State and to make recommendations to the commission for the development of policies and procedures in general. Such advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay.

(i) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of race, religious creed, color, national origin, or ancestry.

(j) To render annually to the Governor and biennially to the Legislature a written report of its activities and of its recommendations.

1420. It shall be an unlawful employment practice unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, or ancestry of any person, to refuse to hire or employ him or to bar or to discharge from employment such person, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

(b) For a labor organization, because of the race, religious creed, color, national origin, or ancestry of any person, to exclude, expel or restrict from its membership such person, or to provide only second-class or segregated membership or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religious creed, color, national origin, or ancestry or any intent to make any such limitation, specification or discrimination.

(d) For any employer, labor organization, or employment agency to discharge, expel or otherwise discriminate against any

person because he has opposed any practices forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this part.

(e) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

1421. The commission is empowered to prevent unlawful employment practices. When it shall appear to it that an unlawful employment practice may have been committed, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner determines after such investigation that further action is warranted, he shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors.

Every member of the commission or its staff who discloses information in violation of the requirements of this section is guilty of a misdemeanor. Such disclosure by an employee subject to civil service shall be cause for disciplinary action under the State Civil Service Act.

1422. Any person claiming to be aggrieved by an alleged unlawful employment practice may file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The Attorney General may, in like manner, make, sign and file such complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to co-operate with the provisions of this part may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful employment practice or refusal to co-operate occurred; except that this period may be extended for not to exceed 90 days following the expiration of that year, if a person

allegedly aggrieved by an unlawful employment practice first obtained knowledge of the facts of the alleged unlawful employment practice after the expiration of one year from the date of their occurrence.

1423. After the filing of any accusation, an investigation shall be made and an attempt to eliminate such practice shall be made as provided in Section 1421 unless such attempt has previously been made.

In case of failure to eliminate such practice, or in advance thereof if in the judgment of the commissioner making the investigation, circumstances warrant, the latter shall cause to be issued and served in the name of the commission, a written accusation, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such accusation, hereinafter referred to as "respondent," to answer the charges of such accusation at a hearing.

1424. Hearings held under the provision of this part shall be conducted, as nearly as practicable, in accordance with the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1, Division 3, Title 2 of the Government Code, and the commission shall have all the powers granted therein.

1425. The case in support of the accusation shall be presented before the commission by one of its attorneys or agents, and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the commission in such case; and the aforesaid endeavors at conciliation shall not be received in evidence.

1426. If the commission finds that a respondent has engaged in any unlawful employment practice as defined in this part, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance. If the

commission finds that a respondent has not engaged in any such unlawful employment practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said accusation as to such respondent. A copy of its order shall be delivered in all cases to the Attorney General, and such other public officers as the commission deems proper.

Any order issued by the commission shall have printed on its face references to the provisions of the Administrative Procedure Act which prescribe the rights of appeal of any party to the proceeding to whose position the order is adverse.

1427. The commission shall establish rules of practice not inconsistent with law to govern the foregoing procedure and its own actions thereunder.

1428. Every final order or decision of the commission is subject to judicial review in accordance with law.

1429. Whenever the commission believes, on the basis of evidence presented to it, that any person is violating or is about to violate any final order or decision issued by it pursuant to this part, the commission may bring an action in the Superior Court of the State of California against such person to enjoin him from continuing the violation or engaging therein or in doing anything in furtherance thereof. In such action an order or judgment may be entered awarding such temporary restraining order or such preliminary or final injunction as may be proper.

1430. Any person who shall willfully resist, prevent, impede or interfere with any member of the commission or any of its agents or agencies in the performance of duties pursuant to this part, or who shall in any manner willfully violate an order of the commission, shall be guilty of a misdemeanor, punishable by imprisonment in a county jail, not exceeding six (6) months, or by a fine not exceeding five hundred dollars (\$500), or both.

1431. The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this

act shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this State relating to discrimination because of race, religious creed, color, national origin or ancestry.

Nothing contained in this act shall be deemed to repeal or affect the provisions of any ordinance relating to such discrimination in effect in any city, city and county, or county at the time this act becomes effective, insofar as proceedings theretofore commenced under such ordinance or ordinances remain pending and undetermined. The respective administrative bodies then vested with the power and authority to enforce such ordinance or ordinances shall continue to have such power and authority, with no ouster or impairment of jurisdiction, until such pending proceedings are completed, but in no event beyond one year after the effective date of this act.

1432. If any clause, sentence, paragraph, or part of this part or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this part and the application thereof to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved.

Sec. 2. Section 56 of said code is amended to read:

56. The work of the department shall be divided into at least nine divisions known as the Division of Industrial Accidents, the Division of Industrial Safety, the Division of Housing, the Division of Labor Law Enforcement, the Division of Fair Employment Practices, the Division of Industrial Welfare, the Division of Labor Statistics and Research, the Division of Apprenticeship Standards, and the State Compensation Insurance Fund.

EMPLOYMENT

Fair Employment Laws—Ohio

Section 4112.01 to 4112.08, inclusive, and Section 4112.99 of the Ohio Revised Code, enacted by the 1959 Ohio General Assembly (Amended Senate Bill No. 10), approved April 29, 1959, make unlawful certain discriminatory practices in employment, create an Ohio civil rights commission for enforcement purposes, and define the commission's powers and duties.

AN ACT to enact sections 4112.01 to 4112.08, inclusive, and section 4112.99 of the Revised Code to prevent and eliminate the practice of discrimination in employment against persons because of their race, color, religion, national origin, or ancestry, and to create a commission to enforce the same and to define its powers and duties.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That sections 4112.01 to 4112.08, inclusive, and section 4112.99 of the Revised Code be enacted to read as follows:

Sec. 4112.01. As used in sections 4112.01 to 4112.08, inclusive, of the Revised Code:

(A) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons.

(B) "Employer" includes the state, or any political or civil subdivision thereof, any person employing four or more persons within the state, and any person acting in the interest of an employer, directly or indirectly.

(C) "Employee" does not include any individual employed in the domestic service of any person.

(D) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or for other mutual aid or protection in relation to employment.

(E) "Employment agency" includes any person regularly undertaking with or without compensation to procure opportunities to work or to procure, recruit, refer or place employees.

(F) "Commission" means the Ohio civil rights commission created by this act.

(G) "Discriminate" includes segregate or separate.

(H) "Unlawful discriminatory practice" means any act prohibited by section 4112.02 of the Revised Code.

Sec. 4112.02 It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, national origin or ancestry of any person, to refuse to hire or otherwise to discriminate against him with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency, because of race, color, religion, national origin, or ancestry to:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise to discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request indicates directly or indirectly that the employer fails to comply with the provisions of sections 4112.01 to 4112.07, inclusive, of the Revised Code.

(C) For any labor organization to:

(1) Limit or classify its membership on the basis of race, color, religion, national origin or ancestry;

(2) Discriminate against any person or limit his employment opportunities, or otherwise adversely affect his status as an employee, or his wages, hours, or employment conditions, because of his race, color, religion, national origin or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs

to discriminate against any person because of his race, color, religion, national origin, or ancestry in admission to, or employment in any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency or labor organization prior to employment or admission to membership, to:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, national origin, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, national origin, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank seeking to elicit information regarding race, color, religion, national origin, or ancestry;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, national origin, or ancestry;

(5) Announce or follow a policy of denying, or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, national origin, or ancestry of such group;

(6) Utilize in the recruitment or hiring of persons any employment agency, placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, national origin, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement which specifies or in any manner indicates his race, color, religion, national origin, or ancestry, or expresses a limitation

or preference as to the race, color, religion, national origin, or ancestry of any prospective employer.

(G) For any person to discriminate in any manner against any other person because he has opposed any unlawful practice defined in this section or because he has made a charge, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under the provisions of sections 4112.01 to 4112.07, inclusive, of the Revised Code.

(H) For any person to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of sections 4112.01 to 4112.07, inclusive, of the Revised Code, or any order issued thereunder, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

Sec. 4112.03. There is hereby created the Ohio civil rights commission to consist of five members, not more than three of whom shall be of the same political party, to be appointed by the governor, with the advice and consent of the senate, one of whom shall be designated by the governor as chairman.

Of the members first appointed, one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any member chosen to fill a vacancy occurring otherwise than by expiration of a term shall be appointed only for the unexpired term of the member whom he shall succeed.

Three members of the commission shall constitute a quorum for the purpose of conducting the business thereof. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission.

Each member of the commission shall be paid an annual salary of five thousand dollars plus necessary and actual expenses while traveling on business of the commission.

Any member of the commission may be removed by the governor for inefficiency, neglect

of duty, misconduct or malfeasance in office, after being given a written statement of the charges against him and an opportunity to be heard publicly thereon.

Sec. 4112.04. (A) The commission shall:

(1) Establish and maintain a principal office in the city of Columbus and such other offices within the state as it may deem necessary;

(2) Appoint an executive director who shall serve at the pleasure of the commission and be its principal administrative officer. The executive director shall be paid an annual salary of twelve thousand dollars;

(3) Appoint hearing examiners and other employees and agents as it may deem necessary, fix their compensation and prescribe their duties subject to the provisions of sections 143.01 to 143.48, inclusive, of the Revised Code;

(4) Adopt, promulgate, amend and rescind rules and regulations to effectuate the provisions of sections 4112.01 to 4112.08, inclusive, of the Revised Code, and the policies and practice of the commission in connection therewith;

(5) Formulate policies to effectuate the purposes of sections 4112.01 to 4112.08, inclusive, of the Revised Code, and make recommendations to agencies and officers of the state or local subdivisions of government to effectuate such policies;

(6) Receive, investigate and pass upon written charges made under oath of practices prohibited by section 4112.02 of the Revised Code;

(7) Make periodic surveys of the existence and effect of discrimination because of race, color, religion, national origin, or ancestry on the enjoyment of civil rights by persons within the state;

(8) Report, from time to time, but not less than once a year, to the general assembly and the governor, describing in detail the investigations, proceedings and hearings it has conducted and their outcome, the decisions it has rendered and the other work performed by it, which report shall include a copy of any surveys prepared pursuant to subdivi-

sion (A) (7) of this section and shall include the recommendations of the commission as to remedial action, legislative and otherwise;

(9) Prepare a comprehensive educational program, in cooperation with the department of education, for the students of the public schools of this state and for all other residents thereof, designed to eliminate prejudice among the various racial, religious, and ethnic groups in this state, to further good will among such groups, to emphasize the origin of prejudice against such groups, its harmful effects, and its incompatibility with American principles of equality and fair play.

(B) The commission may:

(1) Meet and function at any place within the state.

(2) Initiate and undertake on its own motion investigations of problems of employment discrimination.

(3) Hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and require the production for examination of any books and papers relating to any matter under investigation or in question before the commission, and may make rules as to the issuance of subpoenas by individual commissioners. Failure to obey a subpoena issued pursuant to this section shall constitute a contempt punishable, upon the application of the commission, by the common pleas court of the county in which the witness resides, transacts business or is found.

(4) Create such advisory agencies and conciliation councils, local or statewide, as will aid in effectuating the purposes of this act. The commission may itself, or it may empower these agencies and councils to: (a) study the problems of discrimination in all or specific fields of human relationships when based on race, color, religion, national origin, or ancestry; and (b) foster through community effort, or otherwise, good will among the groups and elements of the population of the state. Such agencies and councils may

make recommendations to the commission for the development of policies and procedures in general. Advisory agencies and conciliation councils created by the commission shall be composed of representative citizens serving without pay, but with reimbursement for actual and necessary travelling expenses to those serving on a statewide advisory agency or conciliation council.

(5) Issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of race, color, religion, national origin, or ancestry.

Sec. 4112.05. (A) The commission shall, as hereinafter provided, prevent any person from engaging in unlawful discriminatory practices, as defined in section 4112.02 of the Revised Code, provided that before instituting the formal hearing authorized by this section it shall attempt, by informal methods of persuasion and conciliation, to induce compliance with this act.

(B) Whenever it is charged in writing and under oath by a person hereinafter referred to as the complainant, that any person, hereinafter referred to as the respondent, has engaged or is engaging in unlawful discriminatory practices, or upon its own initiative, the commission may initiate a preliminary investigation. Such charge shall be filed with the commission within six months after the alleged unlawful discriminatory practices are committed. If it determines after such investigation that it is not probable that unlawful discriminatory practices have been or are being engaged in, it shall notify the complainant that it has so determined and that it will not issue a complaint in the matter. If it determines after such investigation that it is probable that unlawful discriminatory practices have been or are being engaged in, it shall endeavor to eliminate such practices by informal methods of conference, conciliation, and persuasion. Nothing said or done during such endeavors shall be disclosed by any member of the commission or its staff or be used as evidence in any subsequent proceeding. If, after such

investigation and conference, the commission is satisfied that any unlawful discriminatory practice of the respondent will be eliminated, it may treat the complaint as conciliated, and entry of such disposition shall be made on the records of the commission. If the commission fails to effect the elimination of such unlawful discriminatory practices and to obtain voluntary compliance with this act, or, if the circumstances warrant, in advance of any such preliminary investigation or endeavors, the commission shall issue and cause to be served upon any person or respondent a complaint stating the charges in that respect and containing a notice of hearing before the commission, a member thereof, or a hearing examiner at a place therein fixed to be held not less than ten days after the service of such complaint. Such place of hearing shall be within the county where the alleged unlawful discriminatory practice shall have occurred or where the respondent resides or transacts business. Any complaint issued pursuant to this section must be so issued within one year after the alleged unlawful discriminatory practices were committed.

(C) Any such complaint may be amended by the commission, or a member thereof, or its hearing examiner conducting the hearing, at any time prior to the issuance of an order based thereon. The respondent shall have the right to file an answer to the original and amended complaint and to appear at such hearing in person, or by attorney, or otherwise to examine and cross-examine witnesses.

(D) The complainant shall be a party to the proceeding, and, in the discretion of the person or persons conducting the hearing, any person may be allowed to intervene therein who (1) has or claims an interest in the subject of the hearing and in obtaining or preventing relief against the acts or practices complained of, or (2) is a necessary party to a complete determination or settlement of a question involved in the proceeding.

(E) In any proceeding, the member, hearing examiner, or commission shall not be bound by the rules of evidence pre-

vailing in the courts of law or equity, but shall in ascertaining the practices followed by the respondent, take into account all evidence, statistical or otherwise, which may tend to prove the existence of a pre-determined pattern of employment or membership, provided that nothing herein contained shall be construed to authorize or require any person to observe the proportion which persons of any race, color, religion, national origin or ancestry bear to the total population or in accordance with any criterion other than the individual qualifications of the applicant.

(F) The testimony taken at the hearing shall be under oath and shall be reduced to writing and filed with the commission. Thereafter, in its discretion, the commission upon notice may take further testimony or hear argument.

(G) If upon all the evidence the commission determines that the respondent has engaged in, or is engaging in, any unlawful discriminatory practice, whether against the complainant or others, the commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of sections 4112.01 to 4112.08, inclusive, of the Revised Code, including, but not limited to hiring, reinstatement, or upgrading of employees with, or without, back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance. If the commission directs payment of back pay, it shall make allowance for interim earnings. Upon the submission of such reports of compliance the commission may issue a declaratory order stating that the respondent has ceased to engage in unlawful discriminatory practices.

(H) If the commission finds that no probable cause exists for crediting the charges, or, if upon all the evidence, the commission finds that a respondent has not engaged in any unlawful discriminatory practice against the complainant or others, it shall state its findings of fact and shall

issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. A copy of the order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper.

(I) Until a transcript of the record in a case shall be filed in a court as hereinafter provided, the commission may, at any time, upon reasonable notice, and in such manner as it shall deem proper, modify or set aside in whole or in part, any finding or order made by it.

Sec. 4112.06. (A) Any complainant, intervener, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue a complaint, may obtain judicial review thereof, and the commission may obtain an order of court for the enforcement of its final orders, in a proceeding as provided in this section. Such proceeding shall be brought in the common pleas court of the state within any county wherein the unlawful discriminatory practice which is the subject of the commission's order was committed or wherein any respondent required in the order to cease and desist from an unlawful discriminatory practice or to take affirmative action resides or transacts business.

(B) Such proceedings shall be initiated by the filing of a petition in court as provided in division (A) of this section and the service of a copy of the said petition upon the commission and upon all parties who appeared before the commission. Thereupon the commission shall file with the court a transcript of the record upon the hearing before it. The transcript shall include all proceedings in the case, including all evidence and proffers of evidence. The court shall thereupon have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter, upon the record and such additional evidence as the court has admitted, an order enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the commission.

(C) An objection that has not been urged

before the commission shall not be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

(D) The court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the commission.

(E) The findings of the commission as to the facts shall be conclusive if supported by substantial evidence on the record and such additional evidence as the court has admitted considered as a whole.

(F) The jurisdiction of the court shall be exclusive and its judgment and order shall be final subject to appellate review. Violation of the court's order shall be punishable as contempt.

(G) The commission's copy of the testimony shall be available at all reasonable times to all parties without cost for examination and for the purposes of judicial review of the order of the commission. The petition shall be heard on the transcript of the record without requirement of printing.

(H) If no proceeding to obtain judicial review is instituted by a complainant, intervenor or respondent within thirty days from the service of order of the commission pursuant to this section, the commission

may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the commission's jurisdiction and resides or transacts business within the county in which the petition for enforcement is brought.

(I) All suits brought under this section shall be heard and determined as expeditiously as possible.

Sec. 4112.07. Every person subject to the provisions of sections 4112.01 to 4112.08, inclusive, of the Revised Code, shall post in a conspicuous place or places on his premises a notice to be prepared or approved by the commission which shall set forth excerpts of this chapter and such other relevant information which the commission deems necessary to explain sections 4112.01 to 4112.07, inclusive, of the Revised Code.

Sec. 4112.08. The provisions of sections 4112.01 to 4112.08, inclusive, of the Revised Code, shall be construed liberally for the accomplishment of the purposes thereof and any law inconsistent with any provision hereof shall not apply. Nothing contained in this act shall be deemed to repeal any of the provisions of any law of this state relating to discrimination because of race, color, religion, national origin, or ancestry.

Sec. 4112.99. Whoever violates section 4112.07 of the Revised Code shall be fined not less than one hundred dollars or more than five hundred dollars.

FAMILY RELATIONS

Miscegenation—Nevada

Senate Bill No. 19, approved March 16, 1959, as Chapter 193, by the 1959 Nevada legislature, repeals statutes which relate to unlawful miscegenetic marriages and provide punishments for persons solemnizing such miscegenetic marriages, as well as to unlawful cohabitation and fornication between certain races.

AN ACT to repeal NRS sections 122.180 and 122.190 relating to unlawful miscegenetic marriages and providing punishments for persons solemnizing miscegenetic marriages; to amend

NRS section 207.080, relating to the definition of a "convicted person" in the requirements of registration and fingerprinting of convicted persons, by deleting references

to NRS sections 122.180, 122.190 and 201.240; and to repeal NRS section 201.240 relating to unlawful cohabitation and fornication between certain races.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

Section 1. NRS 122.180 and 122.190 are hereby repealed.)

Sec. 2. NRS 207.080 is hereby amended to read as follows:

207.080 1. For the purpose of NRS 207.080 to 207.150, inclusive, a "convicted person" is defined as:

(a) Any person who has been or hereafter is convicted of an offense punishable as a felony in the State of Nevada, or who has been or who is hereafter convicted of any offense in any place other than the State of Nevada, which offense, if committed in the State of Nevada, would be punishable as a felony.

(b) Any person who has been or hereafter is convicted in the State of Nevada, or elsewhere, of the violation of any law, whether the same is or is not punishable as a felony:

(1) Relating to or regulating the possession, distribution, furnishing or use of any habit-forming drug of the kind or character described and referred to in the Uniform Narcotic Drug Act.

(2) Regulating or prohibiting the carrying, possession or ownership of any concealed weapon, or deadly weapon, or any weapon capable of being concealed, or regulating or prohibiting the possession, sale or use of any device, instrument or attachment designed or intended to be used for the purpose of silencing the report or concealing the discharge or flash of any firearm.

(3) Regulating or prohibiting the use, possession, manufacture or compounding of

tear gas, or any other gas, which may be used for the purpose of temporarily or permanently disabling any human being.

(c) Any person who, in the State of Nevada, or elsewhere, has been or hereafter is adjudicated, or is convicted of being, a drug addict, as such term is or may be defined in the laws of Nevada.

(d) Any person who has been, or who hereafter is, convicted of a crime in the State of Nevada, under the provisions of one or more of NRS [122.180, 122.190,] 122.220, 199.400, 200.360, 201.010, 201.120 to [201.250, inclusive,] 201.230, inclusive 201.250, 201.270, 201.360 to 201.400, inclusive, 201.420, 202.010, 202.040, 202.050, 202.090, 202.100, 202.190 to 202.230, inclusive, 212.170, 212.180, 433.640, 451.010 to 451.040, inclusive, 452.300, 453.340 to 453.410, inclusive, 462.010 to 462.080, inclusive, 465.010 to 465.070, inclusive, 646.010 to 646.060, inclusive, 646.120, 647.100, 647.110, 647.130, and 647.140, or who has been, or hereafter is, convicted, in any place other than the State of Nevada, of an offense which, if committed in this state, would have been punishable under one or more of such sections.

(e) Any person who has been, or who hereafter is, convicted in the State of Nevada or elsewhere of any attempt or conspiracy to commit any offense described or referred to in NRS 207.080 to 207.150, inclusive.

2. Any person, except as hereinafter set forth in 207.090 to 207.150, inclusive, whose conviction is or has been set aside in the manner provided by law shall not be deemed a convicted person.

Sec. 3. NRS 201.240 is hereby repealed.

Sec. 4. This act shall become effective upon passage and approval.

HOUSING

Multiple-Dwelling, Contiguously Located Housing Accommodations—Massachusetts

Chapter 239 of the 1959 Acts of the Massachusetts Legislature, approved April 22, 1959, amends a statute forbidding discrimination because of race, color, religion, national origin or ancestry in selling or renting "publicly assisted housing accommodations" [see 2 Race Rel. L. Rep. 1155 (1957)] to make unlawful also discrimination on such bases in the sale, lease or rental of "multiple dwellings" and of "contiguously located housing accommodations," as defined by the act.

AN ACT relative to discrimination because of race, creed, color, or national origin in multiple dwelling and contiguously located housing accommodations.

Be it enacted, etc., as follows:

Section 1. Section 1 of chapter 151B of the General Laws is hereby amended by adding after subsection 11, added by section 1 of chapter 426 of the acts of 1957, the following subsection:—

12. The term "contiguously located housing" means (1) housing which is offered for sale, lease or rental by a person who owns or at any time has owned, or who otherwise controls or at any time has controlled, the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), and which housing is located on such land, or (2) housing which is offered for sale, lease or rental and which at any time was one of ten or more lots of a tract whose plan has been submitted to a planning board as required by THE SUBDIVISION CONTROL LAW, as appearing in sections eighty-one K to eighty-one GG, inclusive, of chapter forty-one.

Section 2. Subsection 6 of section 4 of said chapter 151B, added by section 2 of said chapter 426, is hereby amended by inserting after the word "assisted", in line 2, the words:—or multiple dwelling or contiguously located,—so as to read as follows:—

6. For the owner, lessee, sublessee, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other person having the right of ownership or possession or right to rent or lease such accommodations:—

(a) to refuse to rent or lease or otherwise to deny to or withhold from any person or group of persons accommodations because of the race, creed, color or national origin of such person or persons;

(b) to discriminate against any person because of his race, creed, color or national origin in the terms, conditions or privileges of such accommodations or in the furnishing of facilities or services in connection therewith; or

(c) to cause to be made any written or oral inquiry or record concerning the race, creed, color or national origin of a person seeking to rent or lease any such accommodation.

HOUSING

Private Housing—New York

The Council of the City of New York on April 7, 1959, adopted a resolution noting that its Fair Housing Practices Law, adopted April 1, 1958 [3 Race Rel. L. Rep. 92 (1958)], had been in effect a year, reaffirming its support for the principles embodied by the law, congratulating the Commission on Intergroup Relations for the efficient administration of the law, expressing disappointment that the state legislature had failed to enact similar legisla-

tion on a state-wide scale, and resolving to "bend every effort" to secure the passage of such a law at the next session of the legislature. [For Commission reports, see 3 Race Rel. L. Rep. 566, 1076 (1958)].

RES. NO. 566

Resolution Concerning Fair Housing Practices in the City of New York, by Vice-Chairman (Mr. Sharkey), Messrs. Brown and Isaacs—

Whereas, In December, 1957, the Council of The City of New York passed the Sharkey-Brown-Isaacs Bill which the Mayor duly signed on December 30, 1957, and this law, known as Local Law No. 80 of the year 1957, was the first passed in any city or state of this country, outlawing discrimination because of race, religion or national origin in connection with rental or sale of multiple dwellings and groups of ten or more single-family houses, privately-owned; and

Whereas, The enforcement of said law, when it took effect on April 1, 1958, was placed under the jurisdiction of the Commission on Intergroup Relations; and

Whereas, During the past year the law has operated effectively within this City and has been generally accepted by those who live here, both property owners and tenants; and

Whereas, This month marks the anniversary of the passage of the law and has been declared Fair Housing Practices Month by the Mayor of this City; now, therefore, be it

Resolved, That we, the members of the Council of The City of New York reaffirm our support of the principles embodied in said law; congratulate the Commission on Intergroup Relations on the speed with which they organized to enforce the law, the wisdom with which they have attained compliance with it, and the measures taken to make such compliance universal in this City; recognize the full cooperation that all City departments concerned with the law have given to the Commission; and express to the Mayor of this City our satisfaction with his declaration of the month of April, 1959, as Fair Housing Practices Month, all of which helps to bring to full fruition the objectives of this important measure; and be it further

Resolved, That we express our profound disappointment that the Legislature of the State of New York did not see fit to pass the Metcalf-Baker bill which would have spread throughout the State the requirements of Local Law No. 80 of 1957, and our regret that New York State was not the first state in our country, as our City was the first City, to enact such a law; and be it further

Resolved, That we shall bend every effort to secure the passage of such a law at the next session of the State Legislature.

HOUSING

Unfair Housing Practices—Colorado

House Bill No. 259 of the 1959 Colorado General Assembly, as enacted and approved on April 10, 1959, and known as the "Colorado Fair Housing Act of 1959," prohibits the refusal, by persons having the right to transfer or lease housing, to transfer or rent housing to other persons on the basis of race or creed. It also establishes grievance procedures, provides for administration by the Colorado Antidiscrimination Division created by the Colorado Antidiscrimination Act of 1957 [2 Race Rel. L. Rep. 697 (1957)], and sets forth methods of judicial review and enforcement.

AN ACT concerning fair housing practices and making it unlawful to discriminate in the matter of housing against any person because of race, creed, color, sex, national origin, or ancestry.

Be It Enacted by the General Assembly of the State of Colorado:

Section 1. Short title. This act may be known and may be cited as the Colorado Fair Housing Act of 1959.

Section 2. This act shall be administered by the Colorado antidiscrimination division of the state which is under the jurisdiction and direction of the Colorado antidiscrimination commission as created by the Colorado antidiscrimination act of 1957.

Section 3. Definitions. (1) When used in this act: (a) "Court" shall mean the district court in and for the judicial district of the state of Colorado in which the asserted unfair housing practice occurred, or if said court be not in session at that time, then any judge of said court.

(b) "Person" shall mean one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers; any owner, lessee, proprietor, manager, agent or employee; the state of Colorado, and all cities, towns and political subdivisions and agencies thereof, but shall not include any nonprofit fraternal, educational or social organizations or club, unless such nonprofit fraternal, educational or social organization or club shall have the purpose of promoting discrimination in the matter of housing against any person or persons because of race, creed, color, national origin or ancestry.

(c) "Housing" shall mean any building, structure, or part thereof which is used or occupied, or is intended, arranged or designed to be used or occupied as the home or residence of one or more human beings; or any vacant land for sale or lease; but does not include premises maintained by the owner or lessee as the household of his family with or without domestic servants and not more than four boarders or lodgers.

(d) "Unfair housing practices" shall mean those practices specified in section 5.

(e) "Discriminate" shall include both "segregate" and "separate".

(f) "Restrictive covenants" shall mean any specification limiting the transfer, rental, or lease

of any housing because of race, creed, color, sex, national origin, or ancestry.

(g) "Commission" shall mean the Colorado antidiscrimination commission and "commissioner" shall mean a member thereof.

(h) "Coordinator" shall mean the coordinator of fair employment practices which office was created by the Colorado antidiscrimination act of 1957.

(i) The word "transfer" as used herein shall not apply to transfer of property by will or by gift.

Section 4. Powers and duties. (1) The commission shall have the following powers and duties:

(a) To adopt, amend, and rescind rules for governing its meetings. Four commissioners shall constitute a quorum.

(b) To appoint such employees and agents pursuant to article XII, section 13 of the state constitution as it may deem necessary for the enforcement of this act and to prescribe their duties.

(c) To adopt, publish, amend, and rescind regulations consistent with and for the enforcement of this act.

(d) To receive, investigate, and pass upon complaints alleging an unfair housing practice in the transfer, rental, lease, hire, or occupancy of housing; or the existence of an unfair housing practice by any person.

(e) To investigate and study the existence, character, causes, and extent of unfair housing practices by any person, and to formulate plans for the elimination thereof by educational or other means.

(f) To hold hearings upon complaints made against any person; to administer oaths and take the testimony of any person under oath and to compel any person to produce for examination any books or papers relating to any matter involved in such complaint. Such hearing may be held by the commission, or by one or more persons designated as hearing examiners by the commission. To subpoena witnesses and compel their attendance; if a witness either fails or refuses to obey a subpoena issued by the commission, the commission may petition the district court having jurisdiction for issuing a subpoena in the premises and the court shall in a proper case issue its subpoena; refusal to obey such subpoena shall be punishable by contempt. The commission, or a commissioner may issue

a subpoena duces tecum either before or after a complaint has been noticed for hearing.

(g) To issue such publications and reports of studies and research as in its judgment will tend to promote good will among the various racial, religious, and ethnic groups of the state, and which will tend to reduce or eliminate unfair housing practices because of race, creed, color, sex, national origin, or ancestry.

(h) To prepare and transmit to the governor and to the general assembly from time to time, but not less often than once each year, reports describing its proceedings, investigations, hearings it has conducted and the outcome thereof, decisions it has rendered, and the other work performed by it.

(i) To recommend policies to the governor and other persons to effectuate the purposes of this act.

(j) To make recommendations to the general assembly for such further legislation concerning unfair housing practices because of race, creed, color, sex, national origin, or ancestry as it may deem necessary and desirable.

(k) To cooperate, within the limits of any appropriations made for its operation, with other agencies or organizations, both public and private, whose purposes are consistent with those of this act, in the planning and conducting of educational programs designed to eliminate racial, religious, cultural, and intergroup tensions.

Section 5. Unfair housing practices, unlawful and prohibited. (1) It shall be an unfair housing practice and unlawful and hereby prohibited:

(a) For any person having the right of ownership, or possession, or the right of transfer, rental, or lease of any housing:

(i) To refuse to transfer, rent, or lease, or otherwise to deny to or withhold from any person or persons such housing because of race, creed, color, sex, national origin, or ancestry.

(ii) To discriminate against any person because of race, creed, color, sex, national origin, or ancestry in the terms, conditions, or privileges pertaining to any housing, or the transfer, rental, or lease thereof, or in the furnishing of facilities or services in connection therewith.

(iii) To cause to be made any written or oral inquiry or record concerning the race, creed, color, sex, national origin, or ancestry of a person seeking to purchase, rent, or lease any housing.

(b) For any person to whom application is made for financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of any housing to make or cause to be made any written or oral inquiry concerning the race, creed, color, sex, national origin, or ancestry of a person or persons seeking such financial assistance or concerning the race, creed, color, sex, national origin, or ancestry of prospective occupants or tenants of such housing, or to discriminate against any person or persons because of the race, creed, color, sex, national origin, or ancestry of such person or persons or prospective occupants or tenants in the terms, conditions or privileges relating to the obtaining or use of any such financial assistance.

(c) For any person to include in any transfer, rental, or lease of housing any restrictive covenants; or for any person to honor or exercise, or attempt to honor or exercise any restrictive covenant pertaining to housing.

(d) For any person to print or publish, or cause to be printed or published any notice or advertisement relating to the transfer, rental, or lease of any housing which indicates any preference, limitation, specification, or discrimination based on race, creed, color, sex, national origin, or ancestry.

(e) For any person to aid, abet, incite, compel, or coerce the doing of any act defined in this section as an unfair housing practice; or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder or to attempt either directly or indirectly to commit any act defined in this section to be an unfair housing practice.

(f) Nothing contained in this act shall be construed to bar any religious or denominational institution or organization which is operated or supervised or controlled by or is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination, or from making such selections of buyers, lessees, or tenants as are calculated by such organization or denomination to promote the religious or denominational principles for which it is established or maintained.

(g) Nothing contained in this act shall be construed to bar any person from leasing premises only to members of one sex.

Section 6. Procedure. (1) Any person claiming to be aggrieved by an unfair housing prac-

tice may, by himself or by his attorney-at-law, make, sign and file with the commission a verified written complaint in duplicate which shall state the name and address of the person or persons alleged to have committed the unfair housing practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission, a commissioner, or the attorney general may in like manner make, sign, and file such complaint.

(2) Any person whose employees or agents, or some of them, refuse or threaten to refuse to comply with the provisions of this act may make, sign, and file with the commission a verified, written complaint in duplicate asking the commission for assistance to obtain their compliance by conciliation or other remedial action.

(3) After the filing of a complaint, the coordinator or a commissioner shall make, with the assistance of the staff, a prompt investigation thereof, and if such investigating official shall determine that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate such unfair housing practice by conference, conciliation, and persuasion. If it is found that probable cause does not exist for crediting the allegations of the complaint, it shall be dismissed.

(4) The members of the commission and its staff shall not disclose the filing of a complaint, the information gathered during the investigation, or the endeavors to eliminate such unfair housing practice by conference, conciliation, and persuasion, unless such disclosures are made in connection with the conduct of such investigation. However, nothing contained in this subsection shall be construed to prevent the commission from disclosing its final action on a complaint, including the reasons for dismissal of such complaint, the terms of conciliation agreement or the contents of an order issued after hearing.

(5) In case of failure to satisfactorily settle a complaint by conference, conciliation, and persuasion, or in advance thereof if in the opinion of the investigating official circumstances so warrant, he may issue and cause to be served, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint in writing within ten days after the date of such notice or within

such extended time as the investigating official may grant.

(6) When the investigating official is satisfied that further endeavors to settle a complaint by conference, conciliation or persuasion would be futile, he shall report the same to the commission. If the commission determines that the circumstances warrant, it shall issue and cause to be served a written notice requiring the respondent to answer the charges of such complaint at a hearing, and at a time and place to be specified in such notice.

(7) The case in support of such complaint shall be presented at the hearing by one of the commission's attorneys or agents. The investigating official shall not participate in the hearing except as a witness nor shall he participate in the deliberations of the commission in such complaint.

(8) The respondent shall file a written verified answer to the complaint not less than five days prior to the date of the hearing and may appear at the hearing in person, or otherwise, with or without counsel, and may submit testimony. In the discretion of the hearing examiners a complainant may be allowed to intervene and present testimony, either in person or by counsel.

(9) When a respondent has failed to answer a complaint at a hearing as herein provided, the commission may enter his default. For good cause shown the commission may set aside an entry of default within ten days after the date of entry. In the event the respondent is in default, the commission may proceed to hear testimony adduced upon behalf of the complainant. After hearing such testimony, the commission may enter such order as in its opinion the evidence warrants.

(10) The commission or the complainant shall have the power to reasonably and fairly amend the complaint, and the respondent shall have like power to amend his answer.

(11) The commission shall not be bound by strict rules of evidence prevailing in courts of law or equity, but the right of cross-examination shall be preserved. The testimony taken at a hearing shall be under oath and shall be transcribed.

(12) If, upon all of the evidence at a hearing, the commission shall find that the respondent has engaged in or is engaging in an unfair housing practice as defined in this act, the commission shall state its findings of fact and shall

issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such unfair housing practice and to take such affirmative action, including (but not limited to) the transfer, rental, or lease of housing; the making of reports as to the manner of compliance and such other action as in the judgment of the commission will effectuate the purposes of this act.

(13) If, upon all the evidence at a hearing the commission shall find that a respondent has not engaged in any such unfair housing practice or is not engaging in any unfair housing practice, the commission shall state its findings of fact and shall issue and cause to be served an order upon the complainant dismissing the complaint.

(14) The commission shall establish and adopt rules to govern, expedite and effectuate the foregoing procedures and its own actions thereunder.

(15) Any complaint filed pursuant to this act must be so filed within ninety days after the alleged unfair housing practice occurred, or it shall be barred.

Section 7. Judicial review and enforcement.

(1) Any complainant or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue an order, may obtain judicial review thereof; and the commission may obtain an order of court for its enforcement in a proceeding as provided in this section.

(2) Such proceeding shall be brought in the district court in the district in which is located the county wherein the alleged unfair housing practice which is the subject of the commission's order was committed; or wherein any respondent required by the order to cease and desist from unfair housing practice or to take other action, resides or transacts business.

(3) Such proceeding shall be initiated by the filing of a petition in such court, and the service of a copy thereof upon the commission and upon all parties who appeared before the commission. Thereupon the commission shall file with the court a transcript of the record of the hearing before it. The court shall have jurisdiction of the proceeding and the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript an order enforcing, modifying and enforcing as so modified, or

setting aside the order of the commission, in whole or in part.

(4) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

(5) Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided such party shows reasonable grounds for the failure to adduce such evidence before the commission.

(6) The findings of the commission as to the facts shall be conclusive if supported by substantial evidence.

(7) The jurisdiction of the court shall be exclusive and its judgment and order shall be final, subject to review by the supreme court as provided by law.

(8) The commission's copy of the testimony shall be available to all parties for examination at all reasonable times for the purpose of judicial review of the commission's orders.

(9) The commission may appear in court by its own attorney.

(10) Unless otherwise directed by the commission or court, commencement of review proceedings under this section shall operate as a stay of any order.

(11) Petitions filed under this section shall be heard expeditiously and determined upon the transcript filed, without requirement for printing. Hearings in the court under this act shall take precedence over all other matters, except matters of the same character.

(12) If no proceeding to obtain judicial review is instituted by a complainant or respondent within thirty days from the service of an order of the commission pursuant to section 6 hereof, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the jurisdiction of the commission and resides or transacts business within the county in which the petition for enforcement is brought.

Section 8. If any provision of this act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not effect other provisions or applications of this act, and to this end the provisions of this act are declared severable.

Section 9. This act shall take effect on May 1, 1959.

Section 10. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

APPROVED April 10, 1959 at 4:05 p.m.

Stephen L. R. McNichols
GOVERNOR OF THE STATE OF
COLORADO

LEGISLATURES

Legislative Immunity—Alabama

Act No. 8 (House Joint Resolution 17) of the 1959 special session of the Alabama Legislature, approved February 13, 1959, deplors and condemns the action of a federal marshal in serving a subpoena on a member of the legislature, Grady Rogers, at a time when that body was in session, as a "malicious insult to a state in the name of law enforcement." [Note, Rogers, also a member of the board of voter registrars in his county, had been named a defendant in a federal court suit brought under the Civil Rights Act of 1957, charging illegal deprivation of Negro citizens' right to vote in elections held in Alabama. See, *United States v. State of Alabama*, 171 F.Supp. 720, 4 Race Rel. L. Rep. 322, *supra*, (M.D. Ala. 1959)].

WHEREAS, a duly convened session of the House of Representatives of Alabama was rudely interrupted on last Friday morning, February 6, by a federal marshal serving a subpoena on a member of this body in defiance of a long-established custom in this and many other states of according to members of the Legislature immunity not only from arrest but also from service of any and all types of process while attending sessions of the Legislature; and

WHEREAS, this particular interruption was absolutely unnecessary since no procedural delay in the case in which this member was subpoenaed would have resulted from waiting to serve this subpoena on a day and at a time when the Legislature was not in session; and

WHEREAS, the case in which this writ was issued, as well as the way and manner of serving it, evidences an utter disregard for the rights and customs of the State of Alabama, its Legislature and the members thereof and evinces a clear plan or scheme of action on the part of the Department of Justice to harass and irritate the

people of Alabama and ultimately to usurp control for federal civil righters of a state function long accorded to the State of Alabama;—conspicuous by its absence is any evidence that this plan is designed to further the cause of right or justice by fair, honest and impartial law enforcement; now therefore,

BE IT RESOLVED BY THE LEGISLATURE OF ALABAMA, BOTH HOUSES THEREOF CONCURRING, That the action of the Department of Justice relative to the case in which a subpoena was served on The Honorable Grady Rogers, The Representative in the Alabama Legislature from Macon County, during a legislative meeting on February 6, is deplored.

Be It Further Resolved that the manner of serving this subpoena is deemed an affront to the State of Alabama, and the Department of Justice is hereby condemned for this malicious insult to a State in the name of law enforcement.

Be It Further Resolved that a copy of this resolution be sent by the Clerk of the House of Representatives to the Attorney General of the United States.

LEGISLATURES

Legislative Immunity—Alabama

Act No. 88 (House Bill 74) of the 1959 special session of the Alabama Legislature, approved February 24, 1959, provides that members of the legislature shall, except for treason, felony and breach of the peace, be privileged from arrest and service of process while en route to and from and while attending a legislative session, makes it a misdemeanor knowingly and wilfully to deny such privilege, and prescribes a penalty for the denial thereof.

AN ACT relating to privileges and immunities of members of the Legislature: prescribing the cases in which and the time when they shall be privileged from arrest and the service of process, and prescribing a penalty for arresting or attempting to arrest or serving or attempting to serve any civil process on a member during such times.

Be It Enacted by the Legislature of Alabama:

Section 1. Members of the Legislature of Alabama shall in all cases, except treason, felony and breach of the peace be privileged from arrest and shall not be subject to service of any summons, citation or other civil process during their attendance at the session of their respective houses and in going to and returning from the same.

Section 2. Whoever knowingly and willfully denies to any member of the Legislature the privilege and immunity granted herein is guilty of a misdemeanor, and upon conviction shall be punished by fine not exceeding one thousand dollars or by imprisonment for not more than one year, or both.

Section 3. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 4. All laws or parts of laws which conflict with this Act are repealed.

Section 5. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

ORGANIZATIONS

NAACP—Arkansas

Act No. 115 of the 1959 Arkansas General Assembly, approved February 24, 1959, makes unlawful the employment of members of the National Association for the Advancement of Colored People by the state or any school district, county or city in the state.

AN ACT to make unlawful the employment by the state, school district or any county or municipality thereof of any member of the National Association for the Advancement of Colored People, and to provide penalties for violations.

WHEREAS, the National Association for the Advancement of Colored People has, through its program and leaders in the State of Arkansas, disturbed the peace and tranquility which has long existed between the White and Negro races, and has threatened the progress and in-

creased understanding between Negroes and Whites; and

WHEREAS, the National Association for the Advancement of Colored People has encouraged and agitated the members of the Negro race in the belief that their children were not receiving educational opportunities equal to those accorded white children, and has urged the members of the Negro race to exert every effort to break down all racial barriers existing between the two races in schools, public transportation facilities and society in general; and

WHEREAS, the National Association for the Advancement of Colored People has made a strenuous effort to imbue the members of the Negro race with the belief that they are the subject of economic and social strangulation which will forever bar Negroes from improving their standard in life and raising their standard of living to that enjoyed by the White race; and

WHEREAS, the General Assembly believes that in view of the known teachings of the National Association for the Advancement of Colored People and the constant pressure exerted on its members contrary to the principles upon which the economic and social life of our States rests, and that the National Association for the Advancement of Colored People is so insidious in its propaganda and the fostering of those ideas designed to produce a constant state of turmoil between the races, that membership in such an organization is wholly incompatible with the peace, tranquility and progress that all citizens have a right to enjoy; and

WHEREAS, the Special Education Committee of the Arkansas Legislative Council has found that the National Association for the Advancement of Colored People is a captive of the international communist conspiracy;

Now therefore, be it enacted by the General Assembly of the State of Arkansas:

Section 1. It shall be unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State, school district, county or any municipality thereof, and such prohibition against employment by the State, school district, county or any municipality thereof shall continue so long as membership in the National Association for the Advancement of Colored People is maintained.

Section 2. The board of trustees of any public school or State supported college shall be authorized to demand of any teacher or other employee of the school, who is suspected of being a member of the National Association for the Advancement of Colored People, that he submit to the board a written statement under oath setting forth whether or not he is a mem-

ber of the National Association for the Advancement of Colored People, and the immediate employer of any employee of the State or of any county or municipality thereof is similarly authorized in the case any employee is suspected of being a member of the National Association for the Advancement of Colored People. Any person refusing to submit a statement as provided herein, shall be summarily dismissed.

Section 3. A person dismissed from, or declared ineligible for, employment under the provisions of this act, may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause before any circuit court of the State why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of dismissal or ineligibility based on the provisions of this act. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of an order of dismissal or declaration of ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or declaration of ineligibility.

Section 4. Any person employing any individual contrary to the provisions of this act shall be subject to a fine of not exceeding one hundred dollars (\$100.00) for each separate offense.

Section 5. All laws or parts of laws inconsistent herewith are hereby repealed.

Section 6. It has been found and is declared by the General Assembly of Arkansas that the National Association for the Advancement of Colored People has operated in the State of Arkansas in such a manner as to create a state of turmoil between the races, which is incompatible with the public welfare, and that enactment of this bill will tend to alleviate some of the adverse activities of such organization. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

RESETTLEMENT Unemployed Persons—Alabama

Act No. 87 (Senate Bill 13) of the 1959 special session of the Alabama Legislature, approved February 24, 1959, authorizes Wilcox County to institute, whenever approved by referendum, a voluntary program for resettling unemployed persons in locations outside of the state, including arranging and paying for transportation and continuing assistance payments to such expatriated persons for a period not to exceed thirteen months.

AN ACT providing for the reuniting of separated families, and voluntary resettlement of certain unemployed citizens of Wilcox County; authorizing the county to undertake a voluntary resettlement program whenever the program is approved at a referendum; providing for the ordering and holding of the referendum; providing for the financing of the program; providing for the establishment of a county voluntary resettlement committee, and prescribing its powers and duties.

Be It Enacted by the Legislature of Alabama:

Section 1. The court of county commissioners, board of revenue or like governing body of Wilcox County may order an election to determine whether or not financial assistance shall be provided for the voluntary resettlement of unemployed citizens of the county, in the manner hereinafter provided in this Act. The sheriff must give notice at least thirty days before any election to be held under this Act, by publication in some newspaper in the county, if any is published therein, and if not, by written notice posted at the court house door, and at three other public places in the county, of the time of holding and the purpose of the election. The court of county commissioners, board of revenue or like governing body of the county shall provide for the holding of the election on the date specified in the notice. If the question of participating in the voluntary resettlement program fails to carry at any such election, that fact shall not preclude the submission of the question to the voters at subsequent elections held in accordance with this Act.

Section 2. The court of county commissioners, board of revenue or like governing body of Wilcox County shall declare the result of the election, and if a majority of the electors voting on the question have voted in favor of the voluntary resettlement program, the court of county commissioners, board of revenue or like governing body of the county may appropriate

from the general funds of the county, or from any funds available to the county for public welfare purposes, a sum to pay the transportation and resettlement expenses of any unemployed resident of the county who qualifies for resettlement under the provisions of this Act. The funds so appropriated shall be expended as provided herein by a county voluntary resettlement committee, which shall be composed of the circuit solicitor of the county, acting as chairman; or in the event the circuit solicitor is not a resident of Wilcox County, then the county governing body shall designate and appoint a citizen of the county to serve as a member of the committee and as chairman of such; and the probate judge of the county who shall act as associate member of the committee, and the circuit clerk who shall act as associate member of and Secretary-Treasurer of said committee.

Section 3. All persons who are recipients of the State and County Departments of Pensions and Security under the provisions of Section 13 of Act No. 703, General Acts of Alabama 1951, p. 1211, may make application to the County Voluntary Resettlement Committee for funds sufficient to pay the transportation expenses of such person and his or her dependents to any place outside of the State of Alabama. Such applications shall state that the applicant voluntarily intends to change his residence to a certain locality outside the State of Alabama and that he desires and needs the assistance of the County Resettlement Committee in making this change of residence. Such application shall be made public record.

The County Resettlement Committee shall consider each application and base its approval on need and upon funds available.

Upon approval of the application hereinabove provided for by the County Voluntary Resettlement Committee, the Secretary-Treasurer of said Committee is authorized to make arrangements for transportation of the applicant and his dependents to such destination as may be ap-

proved by said Committee and to expend such funds as may be appropriated therefor.

Subsequent to such removal, the department of pensions and security shall make assistance payments to or on behalf of the expatriate in such amounts and for such period of time as the expatriate may be entitled by law and applicable rules and regulations of the department of pensions and security. Following the termination of regular assistance payments by the department of pensions and security, the Commissioner of pensions and security, upon request of the Director of the Wilcox County department of pensions and security, and with the approval of the State Board of Pensions and Security, is authorized to have monthly payments made from any state funds available for such purpose to or on behalf of the expatriate in an amount not in excess of the last regular monthly assistance payment re-

ceived by the expatriate from the department of pensions and security. Such monthly payments may be continued for a period of time which, when added to the number of regular monthly assistance payments from the department of pensions and security after removal from the State, will not exceed a total of thirteen months.

Section 4. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 5. All laws or parts of laws which conflict with this Act are repealed.

Section 6. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

ADMINISTRATIVE AGENCIES

EDUCATION Public Schools—Alabama

The Birmingham, Alabama, Board of Education has adopted the following form letter for reporting denials of applications of parents for re-assignment of their children under the Alabama School Placement Law [1 Race Rel. L. Rep. 235 (1956)], held to be constitutional on its face in *Shuttlesworth v. Birmingham Board of Education*, 162 F.Supp. 372, 3 Race Rel. L. Rep. 413 (N.D. Ala. 1958), *aff'd per curiam*, 79 S.Ct. 221, 3 Race Rel. L. Rep. 867 (1958).

Your completed application for the admission of your child to School for the current semester was received on, after teacher and pupil assignments had been completed and classes organized.

Our study of the reports from the Guidance Department and our investigation in connection with the application have not revealed any

special benefits which this child would receive from such a transfer now or other extraordinary circumstances justifying the granting of said application at this time and it is accordingly denied.

Very truly yours,
s/L. Frazer Banks

EDUCATION Public Schools—Florida

On February 18, 1959, the Board of Public Instruction of Dade County, Florida, after receiving an opinion that four named Negro students meet the criteria set forth in the Pupil Assignment Law, [1 Race Rel. L. Rep. 924 (1956)], presumed to be constitutional in *Gibson v. Board of Public Instruction of Dade County, Florida*, 170 F.Supp. 454, 4 Race Rel. L. Rep. 21 (S.D. Fla. 1958), unanimously voted to assign those students to a previously "white" elementary school. A pertinent extract from the Board's minutes of February 18 appears below.

ITEM #22,148

Approve assignment of four Negro pupils to the Orchard Villa Elementary School, beginning September, 1959:

Doctor Butler then stated that in the light of the Pupil Assignment Law, passed by the Legis-

lature of the State of Florida in July, 1956, and a recent decision of the District Court of the United States for the Southern District of Florida, Miami Division, wherein it was ruled that Board members are required to follow the provisions of the State law until it is repealed, or superseded, or held invalid by a court of

law; therefore, after thorough consideration and study of the facts and circumstances surrounding the individual applications of SHERRY MARIE JOSEPH, IRENE AMANDA GLOVER, JAN ERROL GLOVER, and GARY CHANDLER RANGE for admission to the Orchard Villa School for the school year 1958-59, it is his opinion, in view of the existing legal and factual conditions, that the Board has no alternative but to follow existing laws, and that

the particular students meet the criteria set forth in the Pupil Assignment Law, and therefore, for the reasons aforesaid, he moved that SHERRY MARIE JOSEPH, IRENE AMANDA GLOVER, JAN ERROL GLOVER, and GARY CHANDLER RANGE be assigned to the Orchard Villa School, commencing September, 1959.

Mrs. Roberts seconded the motion, and upon vote being taken, same was unanimously carried.

EDUCATION

Public Schools, Colleges and Universities—Mississippi

The State Sovereignty Commission of Mississippi has issued a question-answer report, entitled "In the Interest of Better Understanding," which contains statistical information concerning various aspects of education in the state.

Question:

What is the Negro school situation in Mississippi today?

Answer:

Under a program begun BEFORE the U. S. Supreme Court school desegregation decision, Mississippi initiated a Negro school construction project which has the anticipated total cost of \$120,000,000.00. Because of more modern planning and design, Negro schools are in many cases superior to those for whites.

Question:

How many Negro teachers are there in Mississippi and what are they paid?

Answer:

There are 7,217 Negro teachers and their total payroll from the state level each year is \$18,825,000.00. Added to this amount is the large contribution to teacher salaries at the county level.

Question:

Does the State of Mississippi pay Negro teachers at the same rate it pays white teachers?

Answer:

Yes. Pay scales are determined by the state only on the basis of educational experience and qualifications, whether the teacher be Negro or white. Over 63% of the Negro teachers hold the highest certificate given by the State Department of Education.

Question:

How does the Negro school enrollment compare with the population ratio?

Answer:

The population ratio in Mississippi is 44.5% Negro to 55.5% white. The Negro school enrollment is 288,246 as compared to a white enrollment of 281,684.

These figures are taken from the 1957-1958 school year.

Question:

Is free transportation provided Negro school children?

Answer:

Yes. 248,500 pupils are transported free of charge in modern, steel buses. Of this number, 107,407 are Negro pupils. Negro children are transported in buses driven by

Negro drivers, at a yearly cost of \$2,191,208.04.

Question:

How much has Mississippi expanded its state expenditures for common school support?

Answer:

In 1946 Mississippi's appropriation for the support of its common schools for the biennium was \$23,000,000.00. In 1958 the appropriation for the biennium was \$100,738,467.00. These figures are for expenditures made at the state level, and do not include county funds. For the current biennium, county funds amount to approximately \$63,262,033.00.

Question:

What sources provide such local funds?

Answer:

Poll taxes and county advalorem taxes.

Question:

How do state expenditures at the college level compare between Negro and white?

Answer:

The 1958-1959 allocation of state appropriated funds for Senior Colleges broken down on the basis of the amount allocated per student, is as follows:

1. Alcorn A. & M. College—(Negro)	\$747.65
2. Mississippi Vocational—(Negro)	725.09
3. University of Mississippi—(white)	675.69
4. Delta State College—(white)	652.54
5. Miss. State College for Women—(white)	552.53
6. Jackson State College—(Negro)	476.47
7. Mississippi State University—(white)	454.67
8. Mississippi Southern College—(white)	387.10

Question:

How many Negro college presidents are there in Mississippi?

Answer:

Mississippi has, in state and private institutions, six Negro senior college presidents and nine Negro junior college presidents.

• • •

NOTE: While it is necessary for this pamphlet to deal more or less in generalities, if you desire a more detailed breakdown on the Negro's stake in Mississippi's dual educational system in any particular county, such information may be obtained by writing the State Sovereignty Commission, New Capitol Building, Jackson, Mississippi.

EMPLOYMENT, PUBLIC ACCOMMODATIONS Anti-Discrimination Laws—Rhode Island

The latest annual report of the Rhode Island Anti-Discrimination Commission, issued on March 17, 1959, deals with Commission activities in the field of fair employment practices and anti-discrimination in places of public accommodation. Excerpts from the Commission's report are set out below.

Introduction

Events in the field of civil rights, during the calendar year of nineteen fifty-eight, reveal that we, as the instrument of government charged with the responsibility of improving human relations and with developing a clearer understanding among our people, are dealing with

perhaps the most important and the most difficult subject that faces our present day society.

The compelling need for improving human relations is not one of localized nature, confined within the borderlines of our state; nor is it sectional; nor even limited to national dimension. Neither is it restricted to the advancement of any specific segment of our people, but

rather it involves mankind all over the world and is the concern of the entire human family.

Each state in this nation has an equal responsibility to these United States of America to meet this challenge. This is no longer a domestic issue nor can it any longer be regarded as a sectional problem. The leaders in all sections must find intelligent methods and approaches to solve these problems of racial and religious intolerance if America is to remain a nation united in the development of a world order to secure peace.

Field of Employment

The remarkable manner in which our State Fair Employment Practices Act has provided effective remedies for long existing difficulties of minority group members, in the field or employment, justifies the value of civil rights legislation. As this statute was the introductory law, its effectiveness becomes the springboard for additional laws to guarantee equality for all.

Though other minorities experience occasional embarrassments and denial of job opportunities, non-white citizens have long been and remain the principal victims. Numerous gates are being opened, however, as a result of the law and free movement or opportunity is rapidly becoming a reality. Despite present employment circumstances, it is gratifying to observe that conditions continue to improve for them. The increasing spread of the members of this group, in our business, industrial, governmental and professional fields, is proof that complete integration and acceptance can be realized and appreciated with order. There has been no evidence of minority members who have properly prepared themselves, through training for positions of higher status, of having been denied equal opportunity. This knowledge should stimulate greater numbers to acquire more training.

A very encouraging note, during this past year, has been that the serious economic dislocation has not resulted in terminations of employment, based on color discrimination. Not one allegation of this nature has been supported by sound evidence. All evidence points to early elimination of discrimination from the area of employment. Free movement and full opportunity for all people will soon be realized in this important field.

Places of Public Accommodation

On April 24, 1952, the Fair Employment Practices Act was amended to extend the jurisdiction of the Commission to include places of public accommodation, resort and amusement. Advancement and improvement for members of all minorities have considerably increased since the effective date of the amendment.

Seven years ago it was the general practice for the vast majority of establishments to deny service to members of minority groups; and such practices are now rare and infrequent. Today these citizens can travel throughout the state, with secure confidence that they will be served in all public places without occasion of incident or fear of embarrassment.

Currently, it is common policy for proprietors and service employees alike to grant similar courtesies to the minority patrons as to general patronage. Although this is as it should be, no more and no less, the improved condition would not exist were it not for the law and its firm and judicious enforcement. The occasional violations are handled with intelligent dispatch and every case to date has been resolved without serious difficulty. *A Second Violation By An Offender Of This Statute Is Yet To Be Recorded Since The Effective Date Of Its Enactment.*

The confidence with which ever greater numbers of minority group members are exercising free movement in places of entertainment, recreation, resort, and amusement, is encouraging. The more expansive the testing, the more successful and lasting the changes. We are rapidly approaching that day when individuals, of any and all minority groups, will be fully accepted on their inherent worth as equal members of the human family.

Public Housing

Our last annual report contained the inclusion of a newly adopted policy designed to eliminate the then remaining patterns of segregation and developing indications of colonization of non-white families. We expressed our confidence, then, that this agreement reached between the Providence Housing Authority and the Commission—designed to eliminate the trouble spots in the housing projects—would produce a needed solution to these long standing problems. The changes and improvements, achieved in the one

year period following the publication of the policy, have been sufficient to support this belief as fully warranted. The dedicated manner in which the Racial Relations Official for the Authority has performed his function, coupled with the sincere cooperation of the Authority and its Administrative Staff, have produced in one year, results heretofore considered beyond the realm of possibility in that short a period of time.

Four buildings, with two located in each of two separate projects, which had been totally occupied by non-white families since prior to the public housing amendment of 1952 are now integrated. Transfers within projects have been honored and such has contributed, in great measure, toward this achievement.

We commend the Providence Housing Authority for its increased efforts. We further commend private organizations, and the local press, for their contributions in providing the teamwork needed to achieve this improvement. We can now state with confidence that in national standing on public housing integration, Rhode Island ranks among the best. With continuing effort and dedication, we must maintain this position of strength.

. . .

Selected Case Examples

Brief descriptions of two cases processed during the past year are explained below, as examples of our regulatory process.

Field of Employment, Color Discrimination

A young lady filed a complaint with the Commission alleging that she telephoned the respondent company, in response to a newspaper advertisement, and was informed the job listed had not been filled and to report in person. She reported less than one hour later but was not hired. Her name, address, and phone number were taken and she was told she would be called if selected. Investigation revealed that a white applicant, who applied after she, had been hired. The owner disclaimed discriminatory hiring practices, even though he had no non-white employees. He disapproved the action of his foreman, issued a directive to this effect, and agreed to employ the complainant. This case

points up discrimination by an individual in a non-discriminatory company.

Public Accommodation, Color Discrimination

Four Negro men alleged in a complaint they had been overcharged for drinks in a food and liquor establishment. They said that white patrons paid less than they for similar drinks. This allegation was supported by evidence in the course of investigation. The owner admitted that he had instructed his service employees to overcharge Negroes to discourage their patronage. He strongly held to the contention that he was entitled to regulate his patronage in this manner. It was explained to him that this was in direct violation of the law. He assured us that he would amend his policy, immediately, to one of total compliance in the future. He issued a directive to all employees to this effect.

Educational Activities

The success of an agency of government, charged with the responsibility of eliminating discrimination, can best be measured by the amount of concentration and emphasis it places upon its educational program. Increasing this phase of our function results in decreasing regulatory needs. The prevention of discriminatory manifestations, the result of inner prejudices, far exceeds, in value, the prosecution of offenders in the development of an improved social climate. The underlying purpose of our educational program is to promote the equal rights and opportunities for all citizens; and to develop better understanding among the various racial, religious and nationality groups.

We regard education as the vehicle which conveys to the general public accurate information on the functions and operations of the Commission. It serves to inform those citizens who do not possess knowledge of the Commission of its existence; it clarifies our functions to others who lack full understanding; and it removes suspicion from the minds of those who regard our agency as a creation to represent only certain minority groups. If we are to hold the confidence of our total populace, we must convince all that we were established as the instrument of government to promote equal opportunity for all our citizens.

. . .

EMPLOYMENT

Economic Status—Mississippi

A "Fact Sheet on the Economic Status of the Negro in Mississippi," setting forth statistical data on Negro employment, occupations, and property holdings in the state has been published by the State Sovereignty Commission, and is reproduced below.

1. GENERAL INFORMATION

According to figures compiled from Federal, State and Sovereignty Commission sources, the total work force in Mississippi of age 14 years and over amounts to 716,282 persons. Of this number, 317,411 are Negroes. 227,270 of these are Negro males, and 90,141 are Negro females.

There are 27,746 Negro farm owners in Mississippi, holding title to a total of 1,722,414 acres of land valued at \$95,468,134.00. There are 138 Negro agricultural extension workers in Mississippi with a total annual payroll of \$471,010.00.

There are 7,217 Negro teachers in Mississippi, paid a total salary at the State level of \$18,825,000.00, which does not include additional pay they receive at the local level.

2. CLASS & NUMBER OF NEGRO WORKERS

(Note: See attached sheets for occupational breakdown of each worker class)

a. Professional, technical & kindred workers	12,061
b. Farmers and farm managers	111,629
c. Managers, officials & proprietors (except farm)	3,144
d. Clerical and kindred workers	1,706
e. Sales workers	1,839
f. Craftsmen, foremen & kindred workers	11,015
g. Operatives and kindred workers	31,505
h. Private household workers	32,075
i. Service workers except private household	20,114
j. Farm laborers and foremen	61,061
k. Laborers	31,262

3. PERTINENT EXAMPLES OF RANDOM COUNTIES AND CITIES

(Note: In Negro professional listing, teachers and preachers are not included unless so designated.)

a. Lee County:

- 82 Negro businesses with estimated value of \$2,000,000.00
- 184 professionals (including teachers), estimated income \$500,000.00
- 288 Negro landowners hold 17,280 acres worth \$864,000.00

b. City of Greenville:

- 141 Negro businesses with estimated value of \$685,000.00
- 13 professionals with estimated income of \$150,000.00
- 287 Negro landowners hold 8,610 acres worth \$861,000.00

e. Oktibbeha County:

- 17 Negro businesses with estimated value of over \$200,000.00
- 123 professionals (including teachers), estimated income \$318,000.00
- 700 Negro landowners hold 55,000 acres worth \$1,650,000.00

d. Jefferson Davis County:

- 27 Negro businesses with estimated value of \$64,000.00
- 95 professionals (including teachers), estimated income \$365,750.00
- 1,800 Negro landowners hold 69,120 acres worth \$4,000,000.00

e. Marshall County:

- 7 Negro businesses with estimated value of over \$100,000.00
- 2 professionals with estimated income of \$16,000.00
- 800 Negro landowners hold 9,600 acres worth \$4,800,000.00

f. City of Laurel:

- 84 Negro businesses with estimated value of \$64,770.00
- 61 professionals with estimated income of \$372,660.00
- 1,071 Negroes own lots and homes worth \$1,846,829.00

g. Montgomery County:

21 Negro businesses with estimated value of \$41,000.00

53 professionals (including teachers), estimated income \$137,337.35
400 Negro landowners hold 50,400 acres worth \$1,108,800.00

EMPLOYMENT, PUBLIC ACCOMMODATIONS

Fair Employment Laws, Anti-Discrimination—Colorado

The Fourth Annual Report of the Colorado Anti-Discrimination Commission indicating its activities in the fields of fair employment practices and public accommodations from July 1, 1957 to June 30, 1958, is reproduced below.

Activities

The Commission's activities fall naturally into three categories: Research, education and regulation. Activities undertaken under any one of these three categories inevitably supplement activities classified under the other two categories. That is, information uncovered by research provides a basis for educational programs and also aids in the processing of complaints; the processing of complaints often uncovers information that might otherwise remain hidden, and also might indicate where the current need for education lies. Total reliance upon any one of the three types of activities for the elimination of discrimination because of race, creed, color, national origin or ancestry would certainly prove ineffective. But when the problems are attacked from all three directions satisfactory results are obtained. That is, discrimination is reduced; understanding among Americans of different ethnic origins is improved; the total economy is strengthened and everybody is happier.

Research

For want of a better term, the word "research" is used here to mean any predetermined method for gathering information as to the existence, cause, extent and character of racial and religious discrimination in employment or in places of public accommodation, or the absence of it.

Last year, the Commission initiated and completed a scientifically planned professional interview survey of the Denver Negro commun-

ity and also initiated and completed a mailed non-disclosure questionnaire survey of private employment practices in Colorado as they relate to minority people. Both surveys were reported in the 1956-57 Annual Report. This year, the Commission's fact-gathering effort has been directed toward labor organizations. This survey was incomplete on June 30. The following is a progress report.

Labor Union Survey

In September 1957 the Commission initiated a survey of labor union locals' practices as they relate to minority people. This survey was designed to accomplish the following purposes:

1. To acquaint union officials with the provisions of the Colorado Anti-Discrimination Act.
2. To solicit union cooperation in carrying out the purposes of the law.
3. To learn from union officials how the Commission can aid them in integrating their memberships.

By June 30, one or more officials of 132 union locals had been interviewed. Information on the following items was sought in each interview:

1. The number of minority people represented by the union.
2. The reception minority people receive when they are referred to jobs by their unions.
3. Whether or not labor-management contracts contain non-discrimination clauses.

4. Whether or not local union by-laws, or international constitutions, contain non-discrimination clauses.
5. How minority members and majority members function together as a group.
6. Whether or not minority workers are promoted the same as majority workers.
7. The method of selecting people for apprenticeship training.
8. Whether or not minority workers are currently enrolled for apprenticeship training.
9. Whether or not the union locals have civil rights or fair employment practices committees.
10. Who handles complaints of discrimination where there is no established civil rights or fair employment practices committee.

The 132 unions visited have approximately 77,000 members of which approximately 10,000 are from so-called minority groups. It was impossible to validate the number of minority members, but the approximate number given seems to be reasonably accurate. The proportion of minority to majority group members is higher now than at any other time. This is a significant fact, for it indicates that progress is being made toward an integrated work force. Although the number of minority members engaged in skilled trades is relatively small, there are substantial indications that minority workers can obtain union membership in many unions when they possess the required qualifications.

The 70 unions that referred members to jobs reported that with but few exceptions management hires those referred regardless of group identity. Many union officials feel that discrimination at the hiring gate could be substantially reduced if recruitment of new workers through union offices was more commonly practiced. Seventeen unions have succeeded in getting non-discrimination clauses written into their labor-management contracts, and 58 international or national constitutions and by-laws contain non-discrimination clauses.

Forty-six officials reported that minority members are upgraded, and 18 reported having minority members enrolled in on-the-job or apprenticeship training classes. Ten union locals have civil rights or fair employment practices committees charged with the responsibility of promoting fair play and the adjusting of complaints of alleged racial or religious discrimination. None of the civil rights committees has a paid staff. Complaints of alleged discrimination arising in

union locals without civil rights committees are handled either by the grievance committee or by the executive board. Considerable concern was expressed by the union officials over the apparent lack of interest of minority people in improving their situations. This lack of interest is indicated by the few who apply for on-the-job or apprenticeship training.

Resulting from the contacts made in connection with the survey, several invitations have been issued to the Commission to actively participate in the planning and conducting of local, state and district union meetings. At one such meeting of the Colorado Labor Council, May 1958, two resolutions pertaining to racial and religious discrimination were adopted. The two resolutions follow:

Resolution No. 4—Civil Rights—Fair Employment Practices

In the course of its first two years, the AFL-CIO has carried forward with diligence and vigor its policy of equal rights and of equal opportunities for all, regardless of race, color, creed or national origin. Our Federation has taken firm steps to give practical application to its non-discrimination policy and to win for it widest acceptance both within the ranks of labor and in the community at large.

Dedicated to bring about the full and equal rights for all Americans in every field of life, the AFL-CIO has provided leadership in the American community in taking timely actions to affirm and to secure these rights.

In this work, prior consideration was given to the removal of discrimination within the ranks of the AFL-CIO itself. For the enduring goal of our Federation is to assure to all workers without regard to race, creed, color or national origin, their share in the full benefits of union organization.

The role of government, national, state and local, is vital to the maintenance of freedom and democracy in our land. In the final count, however, the triumph of human rights will be best assured by the understanding, dedication and action of the people themselves.

Labor with other liberal groups will carry on its historic struggle for human justice in the spirit of brotherhood. As unionists, we hold that intolerance of race, creed, or color in our ranks or in our communities is incompatible with the principles embodied in our constitution.

RESOLVED, That the AFL-CIO carry forward its drive to affirm and secure equal rights for all Americans in every field of life.

The Colorado Labor Council, AFL-CIO, continue to assure to all workers without regard to race, creed, color, or national origin, the full benefits of union organization.

We recommend that our affiliates set up Civil Rights Committees and machinery for effective administration of a meaningful civil rights program within their ranks, working in close cooperation with the Civil Rights Committee and the Civil Rights Department of the AFL-CIO.

We recommend that our affiliates insist on non-discrimination by employers in hire, tenure and conditions of employment, and in advancement of their employees. We urge our affiliates to include a non-discrimination clause in every collective bargaining agreement they negotiate and to provide for effective administration of such a clause.

We recommend that our affiliates take the initiative in assuring equal opportunity in all apprenticeship training and vocational training programs.

We pledge our support for the passage of an enforceable State Fair Employment Practices Act. We also call for enactment of enforceable fair employment practices laws by all cities of Colorado not having such laws and for strengthening of such existing laws where necessary to ensure their effectiveness.

Submitted by
THE EXECUTIVE BOARD
COLORADO LABOR
COUNCIL, AFL-CIO.

No. 1. We recommend that our affiliates work and support other liberal groups within their communities in accordance with the intent of Paragraph 5 of this resolution. We pledge our support to the Colorado Anti-Discrimination Commission not only in implementing the newly revised FEP law, but to strengthen it if needed.

Be it further pledged that the Colorado Labor Council, AFL-CIO, initiate a program whereas first, second and third certificates of achievement be given to locals who in the previous two years made accomplishments in the field of Civil Rights. These certificates of achievement would be presented at each constitutional convention.

With these additions, the committee recommends the adoption of Resolution No. 4.

(The motion was regularly seconded.)

Resolution No. 20—Discrimination—Civil Rights

WHEREAS, It is the policy of the Colorado Labor Council, AFL-CIO, to oppose unfair discrimination in all its forms because of race, creed, color, national origin or ancestry, and

WHEREAS, Unfair discrimination in the rental and the purchase of housing withholds from many Americans their constitutional right to hold and occupy housing facilities of their choice because of race, creed, color, national origin or ancestry, and

WHEREAS, Unfair discrimination in housing imposes an undue hardship upon many workers by compelling them to travel long distances to and from their places of employment, and

WHEREAS, Unfair discrimination in housing because of race, creed, color, national origin or ancestry creates, aggravates and intensifies neighborhood deterioration and crime and delinquency problems because those people discriminated against are compelled to live in sub-standard housing and in overcrowded conditions. Therefore be it

RESOLVED, That the Colorado Labor Council, AFL-CIO, go on record favoring open-occupancy housing, and

That the Colorado Labor Council, AFL-CIO, promote open-occupancy housing in their respective jurisdiction, and

That the Colorado Labor Council, AFL-CIO, actively and aggressively support enforceable open-occupancy housing legislation in the State of Colorado and in its towns and cities.

Submitted for
COLORADO UNIONS OF
PUBLIC EMPLOYEES
(AFL-CIO)

Colorado Federation of
Teachers (AFT)

Colorado State Council of
Locals, No. 13 (AFSCME)

By: Herrick S. Roth, Delegate,
Teachers Local 858.

The committee recommends concurrence, and I so move.

(The motion was regularly seconded. There being no discussion when called for, it was put to a vote and carried.)

Education

The objectives of the Commission's educational activities are as follows:

1. To sell to management the fact that FEP is good business.
2. To obtain for minority people equal treatment by employers, labor organizations, employment agencies and places of public accommodation.
3. To encourage minority people to take advantage of the training and educational opportunities available to all alike.
4. To encourage minority people to make sustained efforts to find jobs commensurate with their training, education, work experience and capabilities.
5. To obtain for minority people equal consideration for employment, upgrading and union membership upon the basis of their individual qualifications regardless of race, creed, color, national origin or ancestry.
6. To obtain for minority people equal treatment by places of public accommodation regardless of race, creed, color, national origin or ancestry.

To achieve those objectives the Commission uses a variety of techniques: Mass media publicity, displays, posters, personal appearances, individual counseling, personal calls on management, labor, employment agencies and places of public accommodation.

• • •

Regulation

By authority vested in it by the Colorado Anti-Discrimination Act of 1957 and the Colorado Civil Rights Anti-Discrimination Act as amended 1957, the Commission is empowered to receive, investigate, and pass upon verified complaints alleging discriminatory or unfair employment practices because of race, creed, color, national origin or ancestry. An aggrieved person, a Commissioner, or the Commission may file verified complaints against a person, an employer, an employment agency, a labor organization or a place of public accommodation.

Complaints may be dismissed upon the face of the information contained in the complaint or after investigation if no probable cause for crediting the allegations is found. If a finding of probable cause for crediting the allegations is made, the investigating official endeavors to settle the complaint by methods of conference,

conciliation or persuasion. If those methods fail to effectuate a settlement, that fact is then reported to the Commission. The Commission then may take whatever action it deems appropriate, including re-referral to the investigating official for further investigation or for further endeavors at conciliation; or it may set the complaint down for hearing.

Complainants may apply to the Chairman of the Commission for reconsideration of an order of dismissal or of the terms of a conciliation agreement. Both the complainant and the respondent may appeal to the district court any order issued after a hearing, or the refusal or failure of the Commission to issue an order.

Complaints Against Places of Public Accommodation

One complaint against a dance studio alleged that complainant was refused dancing lessons because she is a Negro. This complaint was settled by conciliation. The lessons were given to the complainant, and the respondent agreed in writing to admit students on equal terms regardless of group identity.

One complaint against a convalescent home alleged that respondent refused to admit him for nursing care because he is a Negro. The complainant's physician transferred him from a general hospital to the respondent's convalescent home. The respondent refused to allow complainant to remain there and arranged for his admittance to a convalescent home operated by a Negro. This complaint was settled by conciliation. The respondent agreed in writing to admit patients regardless of group identity.

One complaint against a bar and lounge alleged that complainant was refused entrance and service by respondent because she is a Negro. This complaint was settled by conciliation. The respondent agreed in writing to serve all patrons alike regardless of group identity.

Eleven complaints (all members of the same party) against an eating and drinking place alleged they were refused entrance and service because they are Negroes. Respondent denied the allegations. Subsequently, substantially the same party returned to respondent's establishment and were admitted and served. The complaints were dismissed on the ground of no probable cause for crediting the allegations.

One report was received alleging that a bar and lounge had charged the white member of a party the regular price for beer and a higher

price to his two Negro companions. The respondent admitted the allegation. He then instructed his employees to serve all patrons at the same price regardless of group identity and also notified complainants to that effect. No complaint was filed.

Two women reported that a beauty parlor had refused to cut their hair because they are Negroes. However, the complainants failed to file complaints within the statutory time limit of 60 days.

One report from a dance hall alleged that it was losing patronage because of its non-discriminatory practice of admitting patrons regardless of group identity; whereas, a competing dance hall refused admittance to Spanish ancestry people. Investigation of the situation failed to substantiate the charges. Conferences with the parties and other interested people of the community seemed to have cleared up the situation.

One report alleged that a restaurant and bar had charged a Negro woman double the price charged her white companion for drinks. The 60-day statutory limitation for filing complaints expired without a complaint being filed.

Several reports have come to the Commission alleging that certain restaurants display signs saying, "We reserve the right to refuse service to anyone." These reported alleged violations of the public accommodations law have been followed up by correspondence with a request that the sign be removed.

Help-Wanted Advertisements and Application for Employment Forms

Frequently, help-wanted advertisements and application for employment forms containing discriminatory specifications and limitations, as well as discriminatory advertising by places of public accommodation, come to the Commission's attention. Here are sample illustrations of what is meant by discriminatory specifications and limitations:

"JANITORIAL—Unusual position for experienced white man. . . ."

"Place of birth____, race____, religion____, attach photo."

"We reserve the right to refuse service. . . ."

"Clientele restricted to the white race. . . ."

Such restrictions occur in many different forms, some blunt, some subtle. Both, whether blunt or subtle, or intentionally or unintentionally discriminatory, the effect upon people of minor-

ity identity is the same—it gives them a feeling of second-class citizenship.

The usage of restrictive specifications is prohibited by law. Usually, when the violation is called to the attention of the violator, he readily agrees to cease and desist.

Complaints Against Employers, Employment Agencies and Labor Organizations

One complaint against an employer alleged unfair treatment in work assignments followed by termination of employment because complainant's wife was of Cherokee Indian and French Canadian ancestry. The investigation disclosed no probable cause for crediting the allegations. The complaint was dismissed.

One complaint against an employment agency alleged that complainant had been improperly classified and refused referral to any known available jobs because she is of Spanish ancestry. A finding of probable cause for crediting the allegations was made. The complaint was settled by conciliation. The respondent agreed in writing to properly classify and refer applicants in accordance with their qualifications regardless of group identity and to make periodic reports to the Commission as to the manner of compliance. Subsequently, the respondent reported the placement of two applicants of Spanish ancestry in "non-traditional" jobs.

Three complaints against employment agencies alleged refusal to refer because complainant is a Negro. A finding of no probable cause for crediting the allegations was made. The complaints were dismissed.

One complaint against an employer alleged refusal to hire complainant because he is of Spanish ancestry. Prior to a finding by the Commission, the complainant was hired and, the complaint was withdrawn.

Three complaints against employers were dismissed because of lack of jurisdiction—fewer than six employees. In two of these cases, there was prima-facie evidence of discrimination because of color, and in the other there were strong indications of discrimination because of color.

Two reports of suspected discrimination were forwarded to the Commission. However, neither aggrieved person contacted the office.

Thirteen complaints against employers alleged discrimination because of group identity. A finding of no probable cause for crediting the allegations was made. The complaints were dismissed.

Two persons reported that they suspected discrimination by employers because of group identity. Although neither one filed a complaint, it was felt that circumstances warranted an inquiry, in one case an error was found in the personnel record. The error was corrected and the person's name was placed at the top of the eligible list for employment. In the second case, it was found that the job had gone to a better qualified applicant.

One complaint, Martin vs. Arapahoe County School District No. 6, alleged that complainant had been refused consideration for employment as a secondary school teacher because she is a Negro. Without reference to complainant's qualifications, respondent told complainant that it would be futile for her to file an application for a teaching position. The respondent defended its position of not considering the complainant on the basis of qualifications by pointing out that only a few Negro pupils were enrolled and by advancing as an opinion that the community was not ready to accept Negro teachers.

A finding of probable cause for crediting the allegations was made. Endeavors to conciliate the complaint failed.

The Commission set the complaint down for hearing. Based upon the record of the hearing, the Commission found against the respondent and issued and caused to be served a cease and desist order.

One complaint, Beatty vs. Arapahoe County School District No. 6, alleged that complainant had been refused consideration for employment as an elementary school teacher because she is a Negro. Without reference to complainant's qualifications respondent told complainant that it would be futile for her to file an application for a teaching position. The respondent defended its position of not considering the complainant on the basis of qualifications by pointing out that only a few Negro pupils were enrolled and by advancing as an opinion that the community was not ready to accept Negro teachers.

A finding of probable cause for crediting the allegations was made. Endeavors to conciliate the complaint failed.

The Commission set the complaint down for hearing. Based upon the record of the hearing,

the Commission found against the respondent and issued and caused to be served a cease and desist order.

Complaints Pending June 30, 1958

One complaint, Green vs. Continental Airlines Incorporated, alleged refusal to hire because complainant is a Negro. A finding of probable cause for crediting the allegations was made. Endeavors to settle the complaint by conciliation failed.

The Commission set the complaint down for hearing. Both prior to and at the hearing the respondent admitted that the complainant filled the company's requirements for employment as a co-pilot. At the hearing the respondent challenged the Commission's jurisdiction. The respondent's brief and the Commission's brief on the question of jurisdiction and the record of the hearing were before the Commission on June 30, 1958, awaiting action.

Three complaints against employers alleging discrimination because of group identity are under investigation.

One complaint against an employment agency alleging refusal to refer because complainant is a Negro is in a conciliation stage.

The following three charts summarize the total number of complaints processed to June 30, 1958, according to: Respondents, final disposition and Complainant's group identity.

Chart I
Respondents

Year	Employers	Employment Agencies	Unions	Public Accommodations	Total
1951-52	3	1	2	0	6
1952-53	7	2	1	0	10
1953-54	12	0	1	0	13
1954-55	11	0	1	0	12
1955-56	8	4	0	0	12
1956-57	19	3	1	0	23
1957-58	25	5	0	18*	48
Totals	85	15	6	18	124

* Jurisdiction over places of public accommodation was vested in the Commission, April 30, 1957.

Chart II
Final Disposition

Year	Withdrawn	Dismissed	Conciliated	Hearing	Action After Hearing	Pending	Total
1951-52	1	2	2	1	1 Dismissed	0	6
1952-53	5	2	3	0	—	0	10
1953-54	6	5	2	0	—	0	13
1954-55	7	3	0	0	—	2	12
1955-56	7	3	2	0	—	2	12
1956-57	10	7	5	0	—	3	23
1957-58	7	34	4	3	2 Cease & Desist Orders 1 Pending	3	48
Totals	43	56	18	4		3	124

Chart III
Group Identity of Complainant

Year	Spanish Ancestry	Negroes	Jewish	Japanese	Other	Total
1951-52	1	4	1	0	0	6
1952-53	4	6	0	0	0	10
1953-54	2	9	1	0	1	13
1954-55	7	5	0	0	0	12
1955-56	3	7	0	0	2	12
1956-57	10	10	0	0	3	23
1957-58	12	35	0	0	1	48
Totals	39	76	2	0	7	124

Respectfully submitted this first day of December, 1958.

Colorado Anti-Discrimination Commission
By Roy M. Chapman, Coordinator

EMPLOYMENT

Government Contracts—Presidential Committee

The President's Committee on Government Contracts has issued a report, entitled "Five Years of Progress," concerning its 1953-58 activities in carrying out a nondiscrimination policy in employment under government contracts. Excerpts from the report follow.

Introduction

The President's Committee on Government Contracts is the first agency of Government to have, by Executive Order, over-all responsibility for carrying out a nondiscrimination policy in employment under Government contracts.

Between 1941 and 1953 there were Executive Orders relating to nondiscrimination. But not until this Committee was established has there been a Presidential order for action to bring about compliance with the nondiscrimination clause in contracts.

President Eisenhower established the Committee on August 13, 1953, by Executive Order 10479. His Order gave the Committee these responsibilities:

1. To receive complaints and transmit them to the appropriate contracting agency of

Government for processing. The contracting agency is required to report the action taken on all complaints. The Committee then reviews the cases and makes recommendations for further actions.

2. To encourage an educational program by employer, labor, civic, educational, religious, and other voluntary groups.
3. To have cooperative relationships with agencies of state and local governments, as well as non-government organizations.

The extent of the Committee's jurisdiction is to advise, recommend and educate. It is not an enforcing body. *The Executive Order places the enforcing responsibility on the head of each contracting agency of the Government.*

The Committee has developed a system of surveys in addition to receiving complaints. Inspections are made of contractor employment

practices relating to nondiscrimination. If the Committee determines that a contractor is not in compliance with its program, it may recommend that no contract be awarded at the stage of pre-contract negotiation, or in the event that there have been contract relations, that no subsequent contracts be awarded to him.

Examples of Expanding Job Opportunities

Job opportunities for minority group members are multiplying. Records of important employers in all parts of the country show break-throughs from the old restrictive patterns of employment. Today's job specifications are based on an applicant's qualifications and abilities, regardless of race, religion, color or national origin.

"Minority group employment extended to all job classification" is more and more a significant notation on company records. Besides a wider range of jobs, there are improved policies of promotion, and more training opportunities for placement and advancement.

The Complaint Process

Complaints filed with the Committee during 1958 have more than trebled over the number in any of the previous four years. New complaints of employment discrimination numbered 351, bringing to 644 the total filed since the Committee was established in 1953.

Factors accounting for this rise include:

1. Success in reaching more people to explain the objectives and functions of the Committee
2. Opening of regional offices, in the mid-west in 1957 and on the west coast in 1958
3. Development of more cooperative relationships with organizations that act for individuals in filing complaints.

To date the Committee has closed 188 cases, with effective resolution of the issues involved. In addition, 266 cases were closed because of lack of jurisdiction by the Committee since the employers in question did not have Government contracts. Thirty-nine cases were closed because the complainant either failed to furnish adequate

information for processing the case, or voluntarily withdrew his complaint.

The Committee complaint process enables a person, or an organization acting for him, to exercise the right to petition the Government for redress of a grievance. It enables the Committee and the contracting agencies to seek corrective action where there is evidence that a contractor is not living up to the terms of Executive Orders 10479 and 10557.

The Committee and the contracting agencies do not limit their concern to the specifics of a complaint when the investigation reveals that there is a general lack of compliance in the contractor's practices. The complaint file is kept open while periodic followup investigations are made to determine the contractor's progress.

The Committee has extended its negotiations to obtain equal job opportunity on an industry-wide basis, when complaints reveal that the general employment patterns of an industry are not in compliance with the nondiscrimination clause.

The Committee has a small professional staff but nearly 1,000 representatives of the contracting agencies are involved in phases of the Committee program, such as studying complaints before investigation, assigning investigators, making investigations in contractors' plants, getting pertinent facts in plant communities, evaluating results and taking corrective action. All these activities are carried out as part of their responsibilities to their own agencies.

How extensive these activities are is best realized by noting that last year the Government entered into 3½ million new contracts involving approximately 15 billions of dollars.

• • •

Compliance Surveys

The Committee has instituted a system of spot-check inspections of major contractors' plants located in metropolitan areas having Negro populations of fifty thousand or more. These surveys are made without waiting for a complaint to be filed with the Committee.

This survey policy has been adopted because the Committee believes that complaints are not a completely reliable index to the extent and scope of employment discrimination. The Committee seeks to establish a base line from which it may be able to measure the progress of its compliance program. As these surveys are con-

ducted recurrently, among the same group of contractors, progress may be determined from year to year.

The survey program also has educational value for the contracting agencies and the contractors. The agencies gain further experience in the field of nondiscriminatory employment practices by conducting these surveys independent of investigations of complaints. The program enables the contractor to review periodically his employment policies and practices without facing a charge of discrimination.

In these surveys the Committee directs the contracting agencies to ascertain the employers' source of employee recruitment and to furnish an occupational breakdown of his labor force by race. The contracting agencies make suggestions, in appropriate circumstances, to the contractor, for broadening his sources of employee recruitment.

Education

The Committee has given increasing emphasis to the mandate for education in Executive Order 10479. In this work it has

- ... provided assistance to management and labor executives, and to compliance officers of Government contracting agencies.
- ... extended its liaison with public and private organizations in the nondiscrimination field, and
- ... issued information materials to improve public understanding of the Committee's objectives and to show how community action can speed their realization.

Mindful that in community action lies the key to progress, the Committee strives to create a more favorable climate for equal job opportunity.

Status of Complaints Filed With the Committee

	Year ending June 30th				
	1958	1957	1956	1955	1954
ALL COMPLAINTS (CUMULATIVE TOTALS).....	644	293	205	147	65
NEW COMPLAINTS	351	88	58	82	65
COMPLAINTS IN PROCESS	151	106	76	76	26
1. Jurisdiction determination pending	20	9	6	19	
2. Being investigated	70	51	35	28	8
3. Complaints awaiting further action by Subcommittee on Review	48	29	19	10	7
4. Complaints referred to Special Subcommittees.....	13	17	16	19	11
CLOSED CASES	493	187	129	71	39
1. Closed—due to approval of agency action.....	188	112	73	42	18
2. Closed—due to no jurisdiction.....	266	52	40	16	9
3. Closed—due to inadequate information.....	29	19	15	13	12
4. Closed—due to withdrawal of case.....	10	4	1		

Complaints By Type Of Complainants	(Five years) Aug. 13, 1953 to June 30, 1958	(Last year) July 1, 1957 to June 30, 1958	(First 4 years) Aug. 13, 1953 to June 30, 1957
Total	644	351	293
Individual	226	94	132
Negro	172	74	98
White	17	12	5
National Origin	37	8	29
Organization	418	257	161
Private:			
Americans for Democratic Action	4	0	4
Anti-Defamation League of B'nai B'rith	208	205	3
Bureau on Jewish Employment Problems	36	2	34
National Ass'n for the Advancement of Colored People	76	18	58
Religious Liberty Association	3	0	3
Labor Unions	35	14	21
Urban League Branches	28	14	14
Others	17	4	13
Public:			
State and Municipal	11	0	11
Complaints By Basis Of Allegations*	Aug. 13, 1953 to June 30, 1958	July 1, 1957 to June 30, 1958	Aug. 13, 1953 to June 30, 1957
Total	717	416	301
Race	446	216	230
Religion	217	164	53
National Origin	29	21	8
Not Specified	25	15	10

* Allegations exceed the number of complaints filed because some complaints contain more than one allegation.

EMPLOYMENT Labor Relations—Federal Statutes

NECO Electrical Products Corporation and International Union of Electrical, Radio and Machine Workers, AFL-CIO.

National Labor Relations Board, Division of Trial Examiners, Washington, D. C., April 17, 1959, Case No. 15-CA-1093.

SUMMARY: An electrical workers' union complaint filed with the National Labor Relations Board alleged that an electrical products company in 1957 violated provisions of the National Labor Relations Act by engaging in enumerated unfair labor practices in connection with the company's Bay Springs, Mississippi, plant. After a hearing before an NLRB trial examiner, oral arguments were had and briefs were filed. In the union's brief, the trial examiner was charged with having had previously fixed views with regard to certain offers of proof that the union had made as being material as background to the issues framed by the pleading, and request was again made therein that the complaint be amended, although the examiner had previously ruled that the matters thereby sought to be brought in were outside the issues. In his intermediate report and recommended order, the examiner reiterated that the "social attitudes" decried by the union, the "motives for the post-bellum industrialization of the South," resistance to school integration in southern states, and actions taken under other laws were not in issue in this case. Portions of the report and order dealing with racial matters follow.

BUCHANAN, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

The complaint herein alleges that on various dates in August and September 1957 the Company violated Section 8 (a) (1) of the National Labor Relations Act, as amended, 61 Stat. 136, by threatening plant shutdown or removal, curtailment of work, or other economic reprisal if the Union won the representation election, which was held on September 6, and economic reprisal against employees unless they discontinued their union interest and activities or resigned from their employment before the election; interrogated employees concerning their own and other employees' union membership, activities, and feelings; and advised an employee that he was making a mistake in acting as union observer in the election and that he should not do so. The answer denies the allegations of unfair labor practices.

A hearing was held before me at Bay Springs, Mississippi, on February 3, 1959. At the conclusion of the hearing counsel were heard in oral argument, and pursuant to leave granted to all parties, briefs have been filed by the Company and the Union, the time therefor having been extended. The Union's brief touches lightly on the issues before us. Apparently unintentionally since it does not appear to be

characteristic of counsel as I observed him, that brief states that with respect to certain offers of proof by the Union and its motion to amend based thereon "the Trial Examiner has indicated that his views are already fixed." The fact is that counsel came fully prepared and did in detail argue the points at issue, and repeatedly, so that there is no question of either denial of opportunity for him to state his position fully or denial to the Trial Examiner of full basis for making his ruling thereon. With such complete, even repetitious discussion, there is no need for a decisional rehash of the arguments and ruling however much more weighty this report might thereby become and however much counsel, even if still unhappy over the ruling, might be satisfied that views, if mistaken, were not "fixed."

[Requests Complaint Amendment]

While contending that the matters embraced in his offer of proof are material "as background" to the issues framed by the pleadings as they exist without amendment, counsel renews his quarrel with the General Counsel because of the express omission of the allegations which he seeks to include, and urges, as he did at the hearing, that the complaint be amended. Notice, after full argument, that the matters would not be covered in the Intermediate Report and that the ruling "need not be repeated" should be regarded, as it was intended, as sparing all counsel

the burden of further argument on the issue while enabling them to concentrate on the issues remaining before us; this without concern that views are fixed to any extent beyond that inherent in any decision or ruling. The exceptions noted at the hearing can of course be taken to the Board.

It is quite correct that the test is not the effect of interference but the tendency of acts or words to interfere. Despite a colloquy in which it was agreed that the purpose was to show that the effect "might have been," it was repeatedly pointed out that this was outside the issues. Aside from any question of right or authority to amend as urged by the Union, it may be noted here that almost 2 months after the hearing herein it was reported that a United States Senator was proposing amendment of the Act so that

Board-conducted elections would be set aside when appeals are made to race prejudice; the proposal cited "a gaping hole" which now exists. The Union is here seeking to plug that alleged hole by a shortcut method of quasijudicial pronouncement instead of legislative enactment even while such enactment is being considered. The "social attitudes" which the Union decries, the "motives for the post-bellum industrialization of the South," resistance to school integration in Mississippi, Arkansas, and Tennessee, and action taken under other laws are simply not an issue here, and we do not even get to the point of deciding whether certain letters, speeches, etc., are violative under the Act as it now reads and without any proposed or promised amendment.

HOUSING

Publicly-Assisted Housing—New York

Calvin L. WAITE and Janice A. Waite v. SOUTH GATE ESTATES, Inc., and Edward Schwartz.

New York State Commission Against Discrimination, January 26, 1959, Case No. CH-4806-57.

SUMMARY: A Negro couple filed a complaint with the New York State Commission Against Discrimination against a housing development corporation charging racial discrimination in connection with their efforts to purchase a one-family dwelling in a publicly-assisted housing development in Poughkeepsie, New York, in violation of the state "Law Against Discrimination" [see 1 Race Rel. L. Rep. 739 (1956)]. After the investigating commissioner had found probable cause for the complaint, respondents agreed to proposed terms of conciliation which specified that they proceed to perform contracts for construction and sale of houses previously entered into with complainants and another Negro. Subsequently finding that respondents had delayed, without valid reason, to commence construction, SCAD served notice on all parties of a hearing on the charges. Shortly after the notice, however, construction was begun on both houses. Requests by respondents for adjournment of the hearing were granted at that point; and after completion of construction, closing of title, and occupation of the houses by complainants and the other Negro family, the case was marked "case adjusted—after ordered and noticed for hearing."

CONWAY, Investigating Commissioner.

STATEMENT, DETERMINATION OF PROBABLE CAUSE AND DIRECTION FOR ISSUANCE OF NOTICE OF HEARING

On July 20, 1957, Calvin L. Waite and Janice A. Waite, Negroes, residing at 71 North Hamil-

ton Street, Poughkeepsie, New York, made, signed and filed with the New York State Commission Against Discrimination a verified complaint charging South Gate Estates, Inc. with unlawful discriminatory practices against them because of their color in connection with their efforts to purchase a one-family dwelling in a housing development known as South Gate

Estates in Poughkeepsie, New York, which housing accommodations were and are publicly-assisted housing accommodations within the Law Against Discrimination.

The complaint was thereafter amended to take account of various facts adduced during the course of my investigation. The amended complaint charges in substance as follows:

"FIRST: We charge that South Gate Estates, Inc. and Edward Schwartz (hereinafter referred to as the respondents) have committed and continue to commit unlawful discriminatory practices, under section 296.3 of the Law Against Discrimination, in that respondents have discriminated and continue to discriminate against us by denying and withholding from us, because of our color, publicly-assisted housing accommodations located in the housing development known as South Gate Estates, offered for sale to the public by respondents in the Town of Poughkeepsie, County of Dutchess, State of New York,

- a. By failing and refusing, because of our color, to commence construction of the home sought to be purchased by us.
- b. By constructing homes for white purchasers while refusing, because of our color, to construct a home for us.
- c. By failing and refusing, because of our color, to comply with the terms of our contract of sale.
- d. By according to us, because of our color, less favorable treatment than that customarily accorded white purchasers of homes.
- e. By failing and refusing, because of our color, to take the required steps in order to secure for us a GI loan guaranteed by the Veteran's Administration.
- f. By misrepresenting, because of our color, the dates on which construction was to begin and construction was to be completed of the home sought to be purchased by us.
- g. By establishing and maintaining a policy of refusing to construct and refusing to assist in financing homes for Negro prospective purchasers.

"SECOND: We further charge that respondent Edward Schwartz has committed and

is continuing to commit unlawful discriminatory practices, under section 296.4 of the Law Against Discrimination, in that Edward Schwartz has aided, abetted, incited, compelled or coerced or has attempted to aid, abet, incite, compel or coerce and is continuing to aid, abet, incite, compel or coerce respondent South Gate Estates, Inc. to do the acts set forth herein forbidden by the Law Against Discrimination."

I, as Investigating Commissioner, with the assistance of the Commission's staff, have made investigation of said amended complaint.

After such investigation, I have determined that probable cause exists to credit the allegations of said amended complaint.

I have endeavored by conference, conciliation and persuasion, to eliminate the unlawful discriminatory practices complained of. However, respondents have failed to accede to my efforts and have refused to eliminate said unlawful discriminatory practices.

Accordingly, I hereby direct that a notice of hearing be issued and served in the name of the Commission, together with a copy of said amended complaint, requiring respondents to answer the charges of said amended complaint at a hearing before three Hearing Commissioners, sitting as the Commission, at a time and place to be specified in said notice, all pursuant to Section 297 of the Law Against Discrimination.

J. EDWARD CONWAY
Investigating Commissioner

Albany, New York
June 25, 1958

. . .

STATEMENT OF ADJUSTMENT AFTER CASE NOTICED FOR HEARING

On July 20, 1957, Calvin L. Waite and Janice A. Waite, Negroes, residing at 71 North Hamilton Street, Poughkeepsie, New York, made, signed and filed with the New York State Commission Against Discrimination a verified complaint charging South Gate Estates, Inc. with unlawful discriminatory practices against them because of their color in connection with their efforts to purchase a one-family dwelling in a housing development known as South Gate Estates in Poughkeepsie, New York, which housing accommodations were and are publicly-assisted

housing accommodations within the Law Against Discrimination.

The Chairman designated me as Investigating Commissioner and I, with the assistance of the Commission's staff, conducted the investigation herein.

During the course of my investigation, the complaint was amended to take account of various facts adduced thereby. The amended complaint charges in substance as follows:

[The complaint set forth is identical to that in the preceding statement]

After my investigation, I determined that probable cause existed to credit the allegations of said amended complaint.

I endeavored by conference, conciliation and persuasion, to eliminate the unlawful discriminatory practices complained of and I submitted to respondents proposed terms of conciliation which specified, among other things, that respondents proceed to perform the contracts with complainants and with another Negro, by constructing the houses, respectively designated therein. Respondents agreed to comply with such terms. However, I found that respondents had failed to abide by the accepted terms of conciliation. Respondents ascribed several reasons for the delay in commencing construction of the homes in question but in my view there was no valid reason for the delay.

Accordingly, I directed that a notice of hearing be issued and served in the name of the Commission, together with a copy of said amended complaint, requiring respondents to answer the charges of said amended complaint at a hearing before three Hearing Commissioners, sitting as the Commission, at a time and place to be specified in said notice all pursuant to Section 297 of the Law Against Discrimination.

On July 17, 1958, a notice of hearing and copy of the amended complaint were duly served on all parties herein. On the same day, Chairman Charles Abrams designated Commissioners El-

mer A. Carter, John A. Davis and Mary Louise Nice as Hearing Commissioners.

On July 28, 1958, respondents served their verified answers to the amended complaint, wherein respondents in substance denied any discrimination by reason of color and set forth their alleged reasons for the delay in the construction of the home desired to be purchased by the complainants.

[Negroes' Homes Constructed]

Shortly after the notice of hearing and amended complaint were served, respondents commenced construction of complainant's home and also of a home on the same block desired to be purchased by another Negro family.

Thereafter, respondents made several requests for adjournments of the hearing on the ground that construction had been commenced and that the homes in question were proceeding to completion. Because it appeared that respondents were now proceeding with due diligence to construct the homes desired by the complainants and the other Negro family, the requests for adjournment were granted.

The homes in question have been completed, titles have been closed and the complainants and the other Negro family have moved into their new homes.

Accordingly and in view of the foregoing, this case is marked "Case adjusted—after ordered and noticed for hearing."

J. Edward Conway
Investigating Commissioner

Albany, New York
January 26, 1959

Based on the foregoing "Statement of Adjustment after Case Noticed for Hearing", Chairman Charles Abrams' designation, dated July 17, 1958, of Commissioners Elmer A. Carter, John A. Davis and Mary Louise Nice as Hearing Commissioners herein is hereby vacated.

Charles Abrams
Chairman

HOUSING

Publicly-Assisted Housing—Washington

In the Matter of Robert L. JONES, Complainant, and Commander John J. O'Meara, Respondent.

Washington State Board Against Discrimination, Seattle, Washington, April 1, 1959, Case #H-498.

SUMMARY: White owners of an F.H.A. financed home in Seattle, Washington, were charged in a complaint filed by a Negro couple with the State Board Against Discrimination with violating a statute [approved March 2, 1957, 2 Race Rel. L. Rep. 461, 465 (1957)] making it an "unfair practice" for owners of publicly-assisted housing to refuse to sell to persons because of race or color. The Board found that after respondents advertised their home for sale, complainants had attempted to negotiate with respondents, who evaded complainants' inquiries, rejected their tendered \$1,000 earnest money check and agreement to purchase for \$18,000 cash, but quickly agreed to sell to a white person for \$17,250. The Board concluded that the refusal to talk terms with complainants at a time when no other offers had been received showed an intention to refuse to sell to, or even negotiate with, Negroes, even if it should result in financial loss to respondents, amounting to an unfair practice under the statute. Respondents were therefore ordered to accept within three days complainant's offer and tender of earnest money and not to sell to other parties in the meantime.

A hearing was held in this matter in Seattle, Washington, on Saturday April 25, 1959, on a complaint filed by Robert L. Jones with the Washington State Board Against Discrimination. The Washington State Board Against Discrimination was represented at the hearing by Wing C. Luke and Elihu Hurwitz, assistant Attorneys General of the State of Washington. Complainant appeared in person and by his attorney Robert W. Winsor; respondents John J. O'Meara and Donna A. O'Meara his wife appeared in person and by their attorney, Commander W. K. Earle, United States Coast Guard.

The parties and their counsel stipulated that an early hearing in this case had been requested by respondents and it was further stipulated that the jurisdictional requirements prior to the hearing as contained in Chapter 49.60 Revised Code of Washington had all been fulfilled. No formal answer was filed by respondents but leave was granted to them by the tribunal to appear and defend against the Complaint.

The case in support of the complaint consisted of the testimony of Complainant Robert L. Jones, and his wife, John M. Lang, and Mrs. Robert B. Jones, together with Complainant's Exhibits 1 and 2; all of those testifying in support of complainant's case were examined by the State of Washington, by counsel for complainant, and were cross-examined by counsel for respondents. The case in support of the contentions of respondents consisted of the testimony

of respondents and Mae H. Priske and John Lang.

The tribunal heard oral argument from counsel for the State of Washington and counsel for complainant and respondents.

It was stipulated at the hearing that respondents had advertised the sale of their home in the *Seattle Times* for a price of \$18,000.00, and it was further stipulated that their home at all times in question was financed by an F.H.A. mortgage.

[Testimony Consistent]

We note that there were very few discrepancies in the testimony of the various witnesses and none of a substantial nature.

Complainant and his wife, in the company of friends, went through respondents' home on Sunday afternoon, April 19, 1959, during an open-house held by respondents. Respondents knew, when complainant left, that the latter was interested in the home. Shortly after visit of complainant and his wife on that Sunday, complainant Robert L. Jones talked to Mrs. O'Meara on the telephone; during that conversation he asked her if his attorney could come to the home to discuss terms and make arrangements for an earnest money agreement. At time of this telephone call, the respondents clearly understood that complainant was interested in purchasing the home. Mrs. O'Meara told Mr. Jones that there was no point in his attorney's coming out

as others were interested in the house and respondents would not accept any offers until an expected F.H.A. appraisal came through; up to that time, respondents had received no offers on their home. Mrs. O'Meara testified that if another prospective purchaser had come to the house at about the same time as that phone conversation, she would have shown him through the house and discussed price and other terms with him. She was unable to explain, when asked why, in view of that testimony, she advised complainant that there was no point in complainant's attorney contacting her to discuss those same things.

Later that same day, Mrs. Mae Priske and her son, John M. Lang, who had been through the house earlier that day, went through the house again, this time with Mrs. Priske's mother. They expressed interest in the house and, at Mrs. Priske's request, respondents agreed to call her when the F.H.A. appraisal came through so that she could have first opportunity to make an offer on the house.

[Opinions of Neighbors]

Commander O'Meara testified that, as of Monday morning, April 20, 1959, he thought his neighbors might have some thoughts on the matter of a Negro purchasing respondents' home, and that if so, he might give some consideration thereto if he was not bound by law to accept an offer from complainant.

Respondents obtained the F.H.A. appraisal, in the sum of \$17,000.00, on that Monday, after which Mrs. O'Meara called Mrs. Priske, notified her of the appraisal, and told her the selling price would be a little more than the F.H.A. appraisal. Shortly after that conversation, Mrs. Priske called back and obtained information as to the mortgage payment, taxes, assessments, and fuel bills.

Sometime during the morning of Tuesday, the next day, Mrs. O'Meara put up the "For Sale" sign which her husband had taken down earlier that day, and the sign was in place in front of the O'Meara home at about noon of that day when Mrs. Robert B. Jones, a friend of complainant, and Robert W. Winsor, complainant's attorney, came to the O'Meara home. Mrs. O'Meara told them, while they were still outside, that respondents already had an agreement to sell their home. They then were invited inside, and Mr. Winsor then advised Mrs. O'Meara he had an earnest money agreement in which

complainant was offering to purchase the O'Meara house for \$18,000.00 all cash to seller at time of closing together with an earnest money check for \$1,000.00, and tendered her the agreement and the check. Mrs. O'Meara said she wasn't interested and refused to take the agreement and the check, and when Mr. Winsor said he would leave them, she said she would burn them. She did not look at the earnest money agreement and check and they were left on a table when Mr. Winsor and Mrs. Jones left. They were mailed back by Commander O'Meara on April 22.

[Sign Removed]

After Mr. Winsor left, Mrs. O'Meara took down the "For Sale" sign and called Mrs. Priske and agreed with her on a price of \$17,250.00 with earnest money of \$750.00 to be paid.

No earnest money has been paid by Mrs. Priske, no written purchase agreement has been entered into between Mrs. Priske and respondents, nor has Mrs. Priske's home been placed on the market for sale.

From respondents' own testimony it is evident that on Sunday afternoon they knew the complainant was definitely interested in their home. It is also evident from Commander O'Meara's testimony that he felt a sale to complainant, a Negro, might displease neighbors, and that he would consider the neighbors' thoughts if he could lawfully refuse an offer from complainant.

The only reasonable conclusion that can be drawn from Mrs. O'Meara's telephone conversation with complainant on Sunday afternoon, at a time when respondents had received no offer of purchase from anyone, is that she was refusing to even discuss or negotiate a sale to complainant solely because of his color. When Mrs. O'Meara was given an opportunity on the witness stand to explain why she didn't want to talk terms to complainant's attorney at a time when she would have talked terms to other prospective buyers, she was unable to do so. This, coupled with respondents' admitted concern about possible repercussions in the neighborhood following a sale to a Negro, leads us to conclude that this refusal to meet with complainant's attorney was based on the fact that complainant was a Negro.

[Agreement Not Reached]

Moreover, Mrs. O'Meara's actions on Tuesday at the time of the visit of complainant's attorney

cannot be reasonably explained on any basis other than that they were motivated by a desire and intention not to entertain any offer by complainant solely because he was a Negro. At the time that this written offer to purchase for \$18,000.00 was presented by Mr. Winsor, respondents, by their own testimony, had not reached any agreement with Mrs. Priske as to the specific price she would pay for the house; that was not agreed upon until after the complainant's offer. We find it impossible to believe that if the \$18,000.00 offer on Tuesday were by someone other than a Negro, at the very least, respondents would have communicated that fact to Mrs. Priske and would have sold the house to her only if she met that offer. Mrs. O'Meara's refusal to even take the written earnest money form and check tendered her certainly did not constitute a reasonable response to complainant's offer; that offer, by its terms, did not have to be accepted until the following day and, of course, required the acceptance of Commander O'Meara. Mrs. O'Meara's response, under the circumstances involved, and when considered in the light of respondents' other actions and attitudes, is consistent only when an intention to refuse to sell to, or even negotiate with, a Negro, even if it should result in a financial loss to respondents. Indeed, Mrs. O'Meara testified that had complainant offered \$18,000.00 cash money for respondents' home on Sunday, she would not have taken the proffered cash from complainant until she had checked his credit. When it was pointed out to her that there would then be no need to check his credit and she was again asked the same question, she replied that she honestly did not know if she would have sold to complainant.

While it may be true that Mrs. O'Meara, at the time of Mr. Winsor's visit, was not aware of the existence of the Law Against Discrimination, she was certainly aware of it before Mr. Winsor left; and Commander O'Meara was specifically advised of the law by his own attorney on Tuesday, before he returned complainant's offer and earnest money check.

With regard to the negotiations with Mrs. Priske, it is apparent that no binding purchase and sale agreement was ever entered into. As of Tuesday morning, the testimony discloses that, at most, respondents and Mrs. Priske had an oral agreement for the sale of the home to Mrs. Priske for some price in excess of \$17,000.00.

Any conclusion that respondents felt, as of

Tuesday morning, that they had sold their home to Mrs. Priske seems to be refuted by Mrs. O'Meara's affirmative action in putting up the "For Sale" sign in front of their home on Tuesday morning. Commander O'Meara testified that he took the sign down on Tuesday morning because his wife was not going to be home. It developed that she was at home and that she put the sign up again. We attach more significance to her affirmative act of putting up the sign than we would have given to a situation where the sign was up at all times and there had merely been a failure to remove it.

In view of these facts, and our formal findings set forth below, the tribunal concludes that respondents, the owners of publicly-assisted housing, have refused to sell such housing to complainant because of his color, in violation of Revised Code of Washington section 49.60.217 (1), which states as follows:

It shall be an unfair practice:

- (1) For the owner of publicly-assisted housing to refuse to sell, rent, or lease to any person or persons such housing because of the race, creed, color, or national origin of such person or persons;

FINDINGS OF FACT

I.

Complainant, Robert L. Jones, resides at 120-25th Avenue North, Seattle, Washington. He is employed in the United States Postal Service as a letter carrier. Complainant and his wife are Negroes.

II.

Respondents, John J. O'Meara and Donna A. O'Meara, his wife, reside in a home owned by them at 3004 East 70th Street, Seattle, Washington. John J. O'Meara is a Commander in the United States Coast Guard.

III.

Respondents placed their home on the real estate market on or about April 11, 1959, by posting a "For Sale" sign or signs in front of their residence and advertising it for sale for \$18,000.00 in the classified section of the *Seattle Times*, a daily newspaper published in the City of Seattle.

IV.

At all times mentioned herein, the home of respondents was financed in part by an F.H.A. mortgage the repayment of which is guaranteed or insured by the Federal Government and is "publicly-assisted housing" within the provisions of Chapter 49.60, Revised Code of Washington.

V.

On Saturday April 18, 1959, Mrs. Robert B. Jones, a friend of complainant and his wife, visited respondents' home to inspect it and told Commander O'Meara and his mother-in-law that the house was being inspected for a friend. Commander O'Meara at that time stated that the asking price for the house was \$18,000.00, that respondents would take less for cash, and that in any event respondents wanted sufficient money to cash out their equity in the property, and that the purchaser might assume their mortgage carrying interest at five percent per annum. He stated that respondents had had many viewers looking over their home but that they had not heard again from the viewers.

VI.

On Sunday, April 19, 1959, respondents held an "Open House" at their home; on that date, there was a sign on their front lawn reading "For Sale, Open House."

VII.

At about 12:30 p.m. on that Sunday, Mrs. Mae H. Priske of 6828-30th Avenue N.E., Seattle, Washington, and her son, Mr. John M. Lang, visited respondents' home, inspected it, expressed an interest in the home to respondents, and stated that the mother of Mrs. Priske would accompany them later in the day to view the home. No offer was made at that time by Mrs. Priske or by Mr. Lang to purchase respondents' home.

VIII.

At about 3:00 or 3:30 p.m. on that Sunday, complainant, his wife, and their friends Mr. and Mrs. Robert B. Jones and Eugene Lane visited respondents' home and viewed it for twenty or thirty minutes. During that visit the party was given full access to the home, and while there complainant observed to respondent John J. O'Meara that it was difficult for a Negro to

find a home in the North End. Complainant's wife while at the home and just before leaving stated to respondent John J. O'Meara that his house was lovely, that she liked it, and she asked if anybody had made an offer on it; he replied that no offers had been made. Shortly before complainant's leaving the home, the respondents heard complainant say that he would contact his lawyer. Commander O'Meara at that time did not know if complainant was a prospective purchaser but he assumed that complainant was interested in the house.

IX.

After complainant's party left the home, a neighbor of respondent called him over and mentioned the fact that Negroes had been looking at the house, and Commander O'Meara advised the neighbor that he had received no offer from the Negroes, but that they were probably interested in his home.

X.

At about 4:30 p.m. on that Sunday, complainant telephoned the home of respondent and talked with Mrs. O'Meara. Commander O'Meara overheard his wife in that conversation. Complainant then said that he had been unable to reach his attorney about an earnest money agreement and he asked Mrs. O'Meara if his attorney could visit respondents. Mrs. O'Meara said that there was no point in having complainant's attorney go to respondents' home because there were some other parties interested and that respondents were awaiting an F.H.A. appraisal which was expected by Tuesday next and would not accept any offers until it came through.

XI.

At about 5:00 or 5:30 p.m. on that Sunday Mrs. Priske, Mr. Lang, and Mrs. Priske's mother returned to respondents' home to inspect it and all expressed an interest in it. They were then advised by respondents that the F.H.A. appraisal had not been received by them but that it would come through in the next day or two; they were also advised that although \$18,000.00 was the asking price for the house, the actual price would depend upon the F.H.A. appraisal. Mrs. Priske asked respondents if they would advise her of the F.H.A. appraisal before advising anyone else because she wanted a first chance

to make an offer on the home. Respondents agreed to so advise her.

XII.

Twice during that Sunday evening Mr. and Mrs. Robert B. Jones visited respondents' home but found respondents not at home; they talked to Mrs. O'Meara's mother and advised her that they represented complainant, and Commander O'Meara was told that evening by his mother-in-law that people representing complainant had visited the home twice on Sunday evening in the absence of respondents.

XIII.

Respondents returned to their home from a social visit at about 10:00 o'clock that Sunday evening, at which time Commander O'Meara took down the "For Sale" sign.

XIV.

Sometime during the following day, Monday, the "For Sale" sign was again put up in front of the O'Meara home, probably by respondents' son.

XV.

That Monday morning before receiving the F.H.A. appraisal, Commander O'Meara advised his attorney, Commander W. K. Earle, that a Negro couple had inspected his home and had indicated that they might be interested, and Commander O'Meara asked Commander Earle if there was any law concerning discrimination or anything which governed the sale of his home to complainant if an offer were received from complainant. Commander O'Meara testified that he might give consideration to the thoughts of his neighbors if he was not bound by law to accept an offer from complainant. At that time Commander Earle advised Commander O'Meara that the latter could probably sell to whomever he pleased.

XVI.

Later that Monday morning, Commander O'Meara received the F.H.A. appraisal in the amount of \$17,000.00 and took it home to his wife. He asked her to call Mrs. Priske and advise her of the appraisal. Mrs. O'Meara then called Mrs. Priske and advised her of the F.H.A. appraisal and that respondents wanted a little

more than the F.H.A. appraisal as a sales price, although no figure was stated. Mrs. Priske said that she wished to talk to her son and she did so, he asking her to obtain further information from respondents about the amount of the monthly mortgage payment, taxes, heat, interest, assessments, etc., and Mrs. Priske did obtain such information by telephone that day from Mrs. O'Meara. On Monday night respondents felt that they were "well on their way to sell the house."

XVI.

On Tuesday morning, April 21, 1959, Commander O'Meara removed the "For Sale" sign in front of his home as he left. Later that morning Mrs. O'Meara put the sign up again.

XVII.

On Tuesday morning, April 21, 1959, Mr. Robert W. Winsor, attorney for complainant, prepared an Earnest Money Receipt and Agreement (Complainant's Exhibit #1) offering to purchase respondents' home for \$18,000.00, all cash to seller at time of closing and \$1,000.00 as earnest money in the form of a check from Seattle Postal Employees' Credit Union, payable to Robert L. Jones and indorsed by him to Washington Title Insurance Company and J. J. O'Meara. After preparing these documents Mr. Winsor, before noon on that Tuesday and in the company of Mrs. Robert B. Jones, went to respondents' home and introduced himself as attorney for Robert L. Jones. At that time the "For Sale" sign was in place in front of respondents' house. Mrs. O'Meara immediately stated, "We have an agreement to sell the house." She refused to disclose the price offered and once again said that respondents had an agreement to sell. Mr. Winsor told her that he had an earnest money agreement making an offer on the house for \$18,000.00 but Mrs. O'Meara said that they didn't want it and that a lawyer had told her husband that they could sell to whomever they pleased. Mr. Winsor agreed, so long as respondents did not discriminate. Mr. Winsor stated that he would leave the earnest money and earnest agreement, but Mrs. O'Meara said she would burn them; he advised her to check with her lawyer before doing that. She did not look at the earnest money agreement and receipt in his presence, and it was mailed back to him by John J. O'Meara on April 22, 1959, with a covering letter (Complainant's Exhibit #2).

XVIII.

Immediately after Mr. Winsor left, Mrs. O'Meara took down that "For Sale" sign and called her husband to advise him of the visit. Thereafter she called Mrs. Priske and settled on a sales price of \$17,250.00 with earnest money of \$750.00 and agreed that the parties would meet on Wednesday evening to make out an earnest money agreement.

XIX.

No writing has ever been entered into between respondents and Mrs. Priske or Mr. Lang concerning the sale of respondents' home; no money has been received by respondents from Mrs. Priske or her son. Respondents have never investigated the credit or financial resources of Mrs. Priske or Mr. Lang. Mrs. Priske's home has not been placed on the housing market.

XX.

Respondents told several people who had telephoned before Sunday inquiring about their home that there would be an F.H.A. appraisal and they took down the names and telephone numbers of several such inquirers and advised them that the F.H.A. appraisal when received would be communicated to them by respondents. Respondents made no such offer to complainant.

XXI.

Complainant's offer as contained in Complainant's Exhibit #1 is satisfactory to respondents except that they wish the closing date to be June 1, 1959, and not July 1, 1959.

XXII.

Respondents have refused to sell their home

to complainant because of his color and such refusal constituted an unfair practice as defined in R.C.W. 49.60.217.

ORDER

IT IS HEREBY ORDERED that respondents John J. O'Meara and Donna A. O'Meara cease and desist from the unfair practice of refusing to sell their home to complainant because of his color.

To further effectuate the purposes of the Law Against Discrimination (R.C.W. 49.60), IT IS FURTHER ORDERED as follows:

1. Respondents shall, within 3 days after date of receipt by either of them of a copy of this order, accept complainant's offer and tender of earnest money embodied in Exhibit 1 herein and communicate such acceptance to complainant or his attorney, Robert W. Winsor, provided that respondents may submit a counter-offer that the date of closing shall be June 1, 1959, which counter-offer shall be held open for complainant's acceptance for 3 days following receipt of such counter-offer by complainant or his attorney, Robert W. Winsor.

2. That until the expiration of the time limited for acceptance of any such counter-offer with no such acceptance received by respondents, respondents shall not sell or contract to sell their home to Mrs. Mae Priske or anyone other than complainant.

DATED: this 30th day of April, 1959.

Kenneth A. MacDonald

Melville Oseran

Jessie L. Shields

ORGANIZATIONS

NAACP, Committee of 100—Federal Income Tax Exemption

On March 9, 1959, Senator Harry F. Byrd, of Virginia, Chairman of the Senate Finance Committee, wrote to the Commissioner of Internal Revenue, Dana Latham, requesting justification for the tax exempt status granted to the Committee of 100 organized to collect funds

for the "so called legal defense fund" of the National Association for the Advancement of Colored People. Commissioner Latham replied on March 16, promising to begin at once an investigation of the facts surrounding the organization's operations, but estimating that several months would be required to complete it. This exchange of correspondence is reprinted below.

March 9, 1959

Honorable Dana Latham
The Commissioner of Internal Revenue
Washington 25, D. C.

My dear Mr. Commissioner:

Two years ago I wrote to your predecessor, Commissioner Harrington, asking him to give me justification for the tax exempt status that was granted to those who contribute to The Committee of 100, organized for the purpose of collecting funds to be turned over to the so called legal defense fund of the National Association for the Advancement of Colored People and expended for the purposes of this organization.

This letter was acknowledged by the Commissioner, stating that the tax exemption was under study. I waited a year and wrote another letter and received a similar reply. I have been on the Senate Finance Committee for 26 years and Chairman for 5 years. This is the first time I have been unable to obtain a direct answer in a reasonable time in response to a question involving the taxpayers' money.

Assuming that the donors to the NAACP fund are in an average top bracket of 60 per cent, and this is a reasonable assumption as some at least are in the highest tax bracket of 92 per cent, then this tax exemption means that, to that extent, the Federal tax collections are reduced. The amount involved is of substantial consequence, as I am told that \$700,000 is collected each year, and, on a basis of a 60 per cent top bracket of the donors, would mean a loss to the Treasury of more than \$400,000, and has the same effect on the budget as if a direct appropriation were made out of public funds.

I sent to Commissioner Harrington, and I assume the file is available to you, advertisements asking for contributions on a tax exempt basis, and I assume these advertisements were paid for out of tax exempt money. This is propaganda and not tax deductible.

This tax exemption that has been given to the NAACP is legal only for one of two purposes, either for education or for welfare. The NAACP is certainly not an educational organization, and I can see no legality in classifying it as a welfare organization.

I want to ask you to review all of the actions that have been taken to bring about this tax exemption and to cancel it if it does not conform with existing law. I would appreciate it if you will give me a full and complete report at the earliest possible date.

Cordially yours,
s/Harry F. Byrd
Chairman, Senate Finance Committee

• • •

March 16, 1959

Honorable Harry F. Byrd
Chairman, Senate Finance Committee
United States Senate
Washington 25, D. C.

Dear Senator Byrd:

I have your letter of March 9, 1959, with regard to the Federal income tax status of contributions to the Committee of 100 and the N.A.A.C.P. Legal Defense and Educational Fund.

As you know, this matter was the subject of discussion when I appeared before the Joint Committee on Internal Revenue Taxation a few days ago. You can be assured we will follow the procedure outlined to you at that meeting.

As I told you, it will probably take several months to make the difficult investigation of the facts surrounding the actual operations of the organization but we will begin at once and report to you as soon as a conclusion has been reached.

Sincerely,
s/Dana Latham
Commissioner

ATTORNEYS GENERAL

EDUCATION

Fraternities—California

Members of the California General Assembly asked the state attorney general for his opinion on the constitutionality of state college and university recognition of fraternities or sororities which restrict membership on the basis of race, color, religion, or national origin. On January 2, the attorney general replied that the breadth of the question made it impossible to give a categorical answer, since the status of "recognition" and other administration-fraternity relationships vary radically from institution to institution. Some types of relationship would make recognition of a discriminatory organization unconstitutional, the opinion states, while recognition of others would be permissible.

January 2, 1959
NO. 57/84

Nine legislators have requested our opinion on the following question: "Is it violative of the Fourteenth Amendment to the United States Constitution or contrary to the public policy of the State of California for the University of California or other State-owned educational institutions to grant official recognition to social and professional fraternities and sororities which restrict their membership on the basis of race, color, religion, or national origin?"

Our conclusions may be summarized as follows:

The types of relationships which are possible or exist between fraternities and sororities on one hand and the state universities and colleges in California on the other are almost unlimited in number. Certain relationships which are possible or exist between the state schools of higher education and the fraternities and sororities which restrict their membership on the basis of race would clearly be unconstitutional under the United States Constitution and also would be against the public policy of the State of California. On the other hand, other possible or existing relationships between state universities and colleges and fraternities and sororities restricting membership on the basis of race, religion, color, or national origin would be

constitutional. The conclusions and analysis of this opinion do not affect the right of lodges, churches, and other private organizations unconnected with the state to restrict their memberships on the basis of race and religion.

ANALYSIS

OFFICIAL RECOGNITION

The question as phrased does not define the term "official recognition". For the purposes of this opinion it will be assumed the term refers to that status conferred by an institution of higher learning upon fraternities and sororities which gives those organizations certain rights, benefits, and advantages and subjects them to control, regulation, and discipline. What these rights, benefits, advantages, controls, regulations, and disciplines may be, and the conditions under a fraternity will be "recognized" differ radically from campus to campus. (For ease of reference all mention of fraternities includes sororities, professional fraternities, and social fraternities unless otherwise specified.) After receiving correspondence from the State Department of Education, the University of California, most of the state colleges, and such schools as California State Polytechnic College, and the California Maritime Academy it is clear that there is no typical relationship between the

fraternities on the one hand and the state university and colleges on the other which would more adequately define the term "official recognition".

DESCRIPTION OF POSSIBLE FRATERNITY-SCHOOL RELATIONSHIPS

It would be difficult, if not impossible, to attempt a description of all the many actual and possible relationships between fraternities and the public higher educational institutions in California. Even if it were possible to provide a brief description of the present relationships at each school those relationships can and do change. A general description of the possible relationships between a fraternity and universities and colleges is necessary, however, for a discussion of the legal issues here presented.

Some schools prohibit the establishment of any fraternities. Others permit the existence of fraternities but require them to be wholly unconnected with the school or provide them with little or no benefits. Some are fostered and assisted only by persons outside the school, such as parents. Still other schools approve the existence of fraternities and exert limited controls and confer limited benefits. Some schools place strict controls, regulations, and disciplines on fraternities and in addition provide many advantages and benefits, sometimes even financial, for the fraternities. At some schools some fraternity houses are located on campus, owned by the school, and leased to the fraternities. It is not uncommon for fraternities as well as other student organizations to be given the use of campus buildings and facilities while denying such use to other types of student organizations and to non-school and non-student persons and groups. Staff and faculty members of the school administration sometimes serve as advisers to inter-fraternity organizations or to each fraternity to assist those groups in developing educational and social programs.

[Strict Controls]

In nearly all cases where fraternities are not banned by the school, the school administrations exercise relatively strict controls over behavior of the students by regulating not only the fraternities but also certain other persons or organizations providing living accommodations. Frequently, fraternities are required to file lists of members and officers. Minimum scholarship

requirements may be imposed on fraternity members by the schools. Proper conduct at social events and initiation ceremonies is commonly a requisite.

Usually when a school denies a fraternity the right to function, the organization loses any approved relationship or status which it might have, ceases to exist, and can no longer call itself a fraternity. It is then denied the right to rush, pledge, or initiate members of the student body. In most cases when a university or college withdraws "recognition" from a local chapter the national headquarters of the sorority or fraternity withdraws the charter of that chapter.

Most universities and colleges have two types of fraternities, social and professional. The social fraternity usually exists as the name indicates, for social purposes, while also providing living quarters. Professional fraternities exist almost wholly on campus and meetings are usually held in campus facilities. Professional fraternities provide mutual relationships between and among students seeking training and education in the same profession or occupation. Only rarely do professional fraternities and sororities provide living facilities. Sometimes professional fraternities are given greater freedom to use campus facilities than are social fraternities.

[Membership Restricted]

It is common knowledge that for years many if not most fraternities restricted membership in some manner on the basis of race, color, religion, and national origin. It appears, however, that at the state colleges and the various branches of the university most of the fraternities, at least on the local level, no longer have racial and religious restrictions expressly set forth in their charters or constitutions. Most schools and universities in this State appear to be exerting their influence against restrictions on the basis of race and religion. Some schools while seeking the removal of such provisions from the charters and constitutions of existing fraternities have established clear policies prohibiting the establishing of new chapters with such restrictive clauses. In actual practice, as well as in the charters, racial and religious barriers seem to be crumbling in the fraternities at California schools.

The breadth of the question asked in this opinion makes it impossible to give a categorical,

specific, or simple answer. Any specific answer to the question would depend upon the specific relationships which have developed between a particular school and its fraternities.

PRESENT RIGHTS OF RACIAL MINORITIES

If this opinion were being written twenty-five or thirty years ago the question presented would probably have been answered in the negative in regard to most fraternity-state school relationships. However, the decisions of the United States Supreme Court in recent years have rapidly and dramatically extended the rights of racial minority groups. Schools organized pursuant to private trusts may not discriminate on the basis of race, if the schools are operated and administered by a public trustee (*Pennsylvania v. Board of Directors of City Trusts of Philadelphia* (1957), 353 U.S. 230 [Girard College case]). Where labor unions are exclusive agents for collective bargaining they may not discriminate on the basis of race (*Steele v. Louisville and Nashville RR. Co.* (1944), 323 U.S. 192; *Tunstall v. Brotherhood, etc.*, 323 U.S. 210 (1944); *Syres v. Oil Workers International Union* (1955), 350 U.S. 892, reversed 223 F.2d 739 per curiam; *Brotherhood v. Howard* (1952), 343 U.S. 768). Racial discrimination in public education is unconstitutional (*Brown v. Board of Education* (1954), 347 U.S. 483; *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Education* (1955), 349 U.S. 294; *Sweatt v. Painter* (1950), 339 U.S. 629; *McLaurin v. Oklahoma State Regents* (1950) 339 U.S. 637; *Sipuel v. Board of Regents* (1948), 332 U.S. 631; *Missouri v. Canada* (1938), 305 U.S. 337; *Lucy v. Adams* (1955), 350 U.S. 1. Attempts to deprive Negroes of the right to vote by the use of "private elections" by private associations have been held invalid (*Terry v. Adams* (1953), 345 U.S. 461; *Smith v. Allwright* (1947), 321 U.S. 649)). It is also invalid for the courts to enforce restrictive covenants in deeds either by injunction or damages (*Shelley v. Kraemer* (1948), 334 U.S. 1; *Barrows v. Jackson* (1953), 346 U.S. 249)). Discrimination against Japanese based on the fact that at one time some Japanese were ineligible for United States citizenship has also been ruled unconstitutional (*Takahashi v. Fish and Game Commission* (1948) 334 U.S. 410; *Oyama v. Calif.* (1948), 332 U.S. 633).

Moreover, the decisions of the California courts have also gradually extended the rights of racial minorities (*Perez v. Sharp* (1948), 32 Cal.2d 711. [Miscegenation statute unconstitutional]; *James v. Marinship Corp.* (1944), 25 Cal. 2d 721 [Against public policy for a labor union to discriminate against Negroes where union under a collective bargaining agreement maintains a closed shop and closed, or partially closed, union]); *Thompson v. Moore Drydock Co.* (1946), 27 Cal.2d 595 [Same general principle as *Marinship case*]; *Williams v. International Brotherhood of Boilermakers, etc.* (1946), 27 Cal.2d 586 [Same general principle as *Marinship case*]; *Banks v. S.F. Housing Authority* (1953), 120 Cal.App2d 1 (Discrimination in public housing invalid.)

The California Legislature has also enacted provisions in some fields to ensure racial and religious equality (Govt. Code §§ 19702-4 [State Civil Service]; Govt. Code § 8400 [Inquiry as to race on application blanks]; Educ. Code § 14123 [School district employees]; Labor Code § 1735 [Public works employment]; Labor Code § 1777.6 [Apprentices on public works projects]; Civil Code §§ 51, 52, 53, and 54 [Places of public accommodation and amusement; see; Klein, *The California Equal Rights Statutes in Practice*, 10 Stanf. L. Rev. 253]; Educ. Code §§ 8271-3 [Textbooks and teaching]; Penal Code § 405a and 405b [Anti-lynching]; Mil. & Vet. Code § 130 [State Militia]; Wel. & Inst. Code §§ 19, 2010, 2160.4 [Public relief]). In addition this office has issued opinions protecting the rights of racial minorities (18 Ops. Cal. Atty. Gen. 45 [Investigation of unemployment]; 24 Ops. Cal. Atty. Gen. 107 [Firemen]; 26 Ops. Cal. Atty. Gen. 210 [Fair Employment Practices Commission]).

[Judicial Limits]

Even with the judicial sympathy for the rights of racial minorities, the courts, however, have established certain limits beyond which they have not interfered with restrictions based on race, particularly in regard to private activities, but also in certain cases when public agencies are involved to some extent (*In re Girard College Trusteeship*, 138 A.2d 844 (Pa. 1958), Appeal dismissed and Cert. den., 357 U.S. 570. [Rather than admitting the Negroes to the Girard Trust College after the decision in *Pennsylvania v. Board of Directors* (1957), 353 U.S. 230 the

Pennsylvania court replaced the public trustee with a private trustee and the United States Supreme Court refused to review this action by the state court]; Wash. Branch of A. A. of U.W. v. American Assoc. of U.W., 79 F.Supp. 88 (D.C. 1948) Affd. 175 F.2d 368 (1949) [Private association may restrict membership on the basis of race]; Rice v. Sioux City Memorial Park Cemetery (Ia. 1953), 60 N.W. 2d 110, Cert. den [Private cemetery may restrict burials on the basis of race]; Long v. Mt. View Cemetery Assoc. (1955), 130 Cal.App. 2d 328 [Private cemetery may restrict burials on the basis of race]; Coleman v. Middlestaff (1957), 147 Cal. App.2d Supp. 833 [Dentist licensed by state not required to accept patients regardless of race].

POWERS OF UNIVERSITIES AND COLLEGES OVER FRATERNITIES

It is clear that, based on the fundamental control of the schools over students, fraternities may be banned from colleges and universities or, in the alternative, may be strictly controlled (Hamilton v. Regents of the University of California (1934), 293 U.S. 245, 262; Waugh v. Board of Trustees of Mississippi University (1915), 237 U.S. 589; Pyeatte v. Board of Regents of University of Okla. (1951) (D.C.W. D.Ogl.), 102 F.Supp. 407 affirmed 342 U.S. 936 (1952); Hughes v. Caddo Parish School Board (1944) (D.C.W.D. La.), 57 F.Supp. 508, affirmed 323 U.S. 685; Satan Fraternity v. Board of Public Instruction (Fla.), 22 So.2d 892 (1945); Bradford v. Board of Education (1912), 18 Cal. App.19; See Educ. Code § 16075 in regard to elementary and secondary schools in California). As an exercise of state police power there is also little doubt but that a university or college by policy, rule, regulation, or state statute could refuse recognition to any fraternity which restricts its membership on the basis of race, religion, etc. (Webb v. State Univ. of N. Y. (1954), 125 F. Supp. 910; appeal dismissed 348 U.S. 867 (1954) for want of a substantial federal question); Waugh v. Board of Trustees of Miss. Univ. (1915), 237 U.S. 589; see, Railway Mail Assn. v. Corsi (1945), 326 U.S. 88, 93-94; Williams v. Int., etc. of Boilermakers, 27 Cal.2d 589).

EQUAL PROTECTION

The pertinent question presented by the request for this opinion is whether in the absence

of a specific requirement by the state legislature, or by the state school or university, a state university or college is precluded from granting "official recognition" (with whatever controls, status, advantages, and benefits may be involved) to fraternities restricting membership on the basis of race and religion. It is clear that where persons are subjected to certain conduct which the courts deem to be unfair and contrary to public policy, to be a denial of equal protection, or to be a denial of due process, the courts have full power to afford necessary protection even in the absence of statute (Williams v. Int., etc. of Boilermakers (1946), 27 Cal.2d 587, 589-590; Brown v. Bd. of Educ. (1954), 347 U.S. 483; Bolling v. Sharp (1954), 347 U.S. 497).

No cases have been disclosed dealing with racial and religious restrictions by fraternities at state colleges and universities other than Webb v. State Univ. of N.Y. (1954) (125 F.Supp.910; Appeal dismissed 348 U.S. 867 (1954) for want of substantial federal question) in which the university action in expressly prohibiting discrimination was held to be valid. The only discussion disclosed of the precise problem here presented is Horowitz, Discriminatory Fraternities at State Universities, 25 So.Cal.L.Rev. 289 (1952) in which the thesis is presented that it is unconstitutional for state universities to recognize fraternities which restrict their membership on the basis of race.

[Other Discrimination Cases]

In addition to the Girard Trust case and the election and labor cases cited above, there are many cases involving discrimination on the basis of race by private associations where public agencies or a public purpose are involved either directly or indirectly. Many cases have held the actions of the public agencies or the relationships established to be unconstitutional (Muir v. Louisville Park Theat.Assoc., (1954) 347 U.S.971; vacating and remanding 202 F.2d 275 [Private association leasing amphitheatre in a public park for certain periods of time in the summer for presentation of operas refused to admit Negroes as spectators]; Derrington v. Plummer (C.A.5; 1956), 240 F.2d 922 [Cafeteria located in a public building operated by private person under lease from public refused to serve Negroes]; Department of Conservation & Development v. Tate (C.A.;1956), 231 F.2d 615,

affirming 133 F.Supp. 53 (1955) [State Park leased to private operators who discriminated on the basis of race]; *Kerr v. Enoch Pratt Free Library* (C.A.4; 1945) 149 F.2d 212 [Private corporation operating a library established by private person where officers are appointed by the public and the corporation is subject to public control and received public funds]; *Nash v. Air Terminal Services* (1949) (D.C.E.D.Va.), 85 F.Supp. 545 [Private concessionaire under lease from Federal Government operating restaurant in a federal airport and refusing to serve Negroes]; *Lawrence v. Hancock* (D.C.S.D. Va.; 1948), 76 F.Supp. 1004 [Public swimming pool leased to a private association which discriminated on the basis of race]; *Culver v. City of Warren* (Ohio, 1948), 83 N.E.2d 82 [Public swimming pool leased to a private association, which permitted membership only after secret ballot by means of which Negroes were excluded]; *Kern v. City Commissioners* (Kan.; 1940) 100 P.2d 709 [Public facility leased to private party who discriminated on the basis of race]; *Ming v. Horgan*, Superior Court, California, Sacramento County, # 97130, June 23, 1958, 3 Race Rel.L. Rep.726 [Private Subdividers building and selling homes under FHA and VA discriminated on the basis of race].

In addition, the United States Supreme Court has declared unconstitutional any limit on free speech by private persons even in the absence of governmental action where the speech took place in a private company town (*Marsh v. Ala.*, 326 U.S.501 (1946)).

Many other cases have held the actions of public agencies or the relationships established by public agencies with private persons or organizations to be constitutional even though the private person or organization restricted the particular activity on the basis of race (*Oliphant v. Brotherhood of Locomotive Firemen & Enginemen* (D.C.Ohio;1957) 156 F.Supp. 89, affirmed Court of Appeals, 6th Cir.Nov. 26, 1958, 27 L.W.2271, ____ F.2d ____ Petition for Cert. filed Dec. 5, 1958 [Negroes refused admission to labor union certified by the federal government as exclusive bargaining representative]; *Eaton v. Board of Managers* (D.C., N.C. 1958), 164 F.Supp. 191, affirmed Nov. 29, 1958 (C.A.4), 27 L.W.2286, ____ F.2d ____ [Negro doctors were refused permission to practice medicine at a hospital which received moneys from the public for services performed, even though half of the land owned by the hospital was originally owned

by the public and in the past financial contributions had been made to the hospital by the public]; *Mitchell v. Boys Club of Metropolitan Police* (D.C.; 1957), 157 F.Supp. 101 [Racially-segregated boys clubs operated by a private corporation partially in public buildings with substantial financial assistance from the public and with public employees assigned to work with the boys clubs]; *Johnson v. Levitt & Sons* (D.C.Pa.; 1955), 131 F.Supp. 114 [A builder operating under FHA and VA discriminating on the basis of race]; *Easterly v. Dempster* (D.C.,Tenn.; 1953), 112 F.Supp.214 [Segregated public golf course leased to private persons]; *Norris v. Mayor & City Council of Baltimore* (D.C.Md.,1948), 78 F.Supp. 451 [Segregated private school with 23% of its revenue from public sources and with a percentage of its students appointed by public officers]; *Dorsey v. Stuyvesant Town Corporation* (N.Y.1949), 87 N.E.2d 541, Cert. den. 339 U.S. 981 [Negroes refused admittance into housing development owned by private parties and constructed partially with public funds where eminent domain was available for use in acquisition of the land]; *Harris v. St. Louis* (Mo.1938), 111 S.W.2d 995 [Short-term lease of city auditorium for not more than several weeks to private persons who refused admittance to Negroes where the public agency would lease to white or Negro groups, but not to mixed racial groups].

[Role of Ming Case]

Possibly the most interesting, and when it becomes final perhaps the most significant case in California is *Ming v. Horgan* (Superior Court, California, County of Sacramento, No.97130 June 23, 1958, 3 Race Rel.L.Rep.726), in which the court issued a memorandum opinion. That case is now in the process of appeal. In the *Ming* case, a Negro claimed to have been excluded from eligibility to purchase a new tract home in one after another of FHA and VA insured subdivisions in the Sacramento area in California. His contention was that such exclusion was based solely upon his race and color, despite his financial and other qualifications. The court there held that the plaintiff had proved he was excluded from purchasing a home because of his race and color, and that such exclusion was a violation of the plaintiff's rights. The court stated, on page 12, of its memorandum opinion:

"... Can the courts close their eyes to the

inevitable result that if they should uphold defendants in their asserted right of freedom of contract, they would for practical purposes be reverting to a 'separate but equal' rule for those to whom the builders and realtors choose to apply it? Negroes could still get housing—they might persuade someone else to buy and remain as undisclosed principal (at least one of the witnesses in our case seems to have done this—by means of 'subterfuge' he said; or they could buy from original purchasers in tracts who might be willing to sell to them; or they might be able to develop tracts expressly for members of their race (this latter being strictly a separate but equal concept). But gone would be the principle of integration which seems to have become the law of the land as a necessary component of the equality of right required by the Constitution. If that principle is to be the guiding rule in so personal a relationship as marriage (Perez v. Sharp, 32 Cal.2d 711), as well as education and recreational facilities, and if it is to be applied in public housing (Banks v. Housing Authority, 120 Cal.App.2d 1; Cert.denied by U.S. Supreme Court, 347 U.S. 974), there would seem to be no basis for denying its applicability to the acquisition of real property. *If it be objected that Congress refused to so ordain, it might be replied that Congress could not ordain otherwise—the law does not permit it to differentiate between races, and whether it expresses that limitation in so many words or not, those who operate under that law and seek and gain the advantage it confers are as much bound thereby as the administrative agencies of government which have functions to perform in connection therewith.* Congress must have intended the supplying of housing for all citizens, not just Caucasians—and on an equal, not a segregated basis. If the courts were to hold otherwise and accord to builders and realtors the unfettered freedom of contract here contended for, the constitutional guaranties of equal protection and non-discrimination would be accorded only secondary importance and they would have to recede from a good deal that has been laid down in recent years as fundamental doctrine. . . ." (Emphasis added).

In *Muir v. Louisville Park Theatrical Association*, 347 U.S. 971 (1954) vacating and remanding 202 Feb.2d 275, the pertinent facts would seem to be that the private organization was operating on public property and held its

performances open to the public generally except for persons of certain races.

In *Ming v. Horgan* (Superior Court of the State of California, County of Sacramento, # 97130, June 23, 1958, 3 Race Rel. L. Rep. 726), financial and other aid and benefit seems to be the crucial consideration. In a case such as *Kerr v. Enoch Pratt Free Library of Baltimore City* (149 F.2d 212 (C.A.4;1945)), the considerations requiring unconstitutionality included both financial aid and administrative control. In the *Girard College* cases (*Pennsylvania v. Board of Directors of Philadelphia* (1957), 353 U.S. 230 and *In Re Girard College Trusteeship* (Pa.1958), 138 A.2d 844, appeal dismissed and cert. denied, 357 U.S. 570) constitutionality and unconstitutionality seemed to hinge on whether the management and control was technically in the hands of a public trustee. In such cases as *Dorsey v. Stuyvesant Town Corporation* (N.Y.;1949) (87 N.E.2d 541), *Norris v. Mayor and City Council of Baltimore* (D.C.Md. 1948) (78 F. Supp. 451), *Eaton v. Board of Managers of James Walker Memorial Hospital* (D.C. N.C.; 1958) (164 F.Supp. 191, affirmed November 29, 1958 (C.A.4) 27 L.W. 2286, ___ F.2d ___), and *Mitchell v. Boys Club of Metropolitan Police* (D.C.; 1957) 157 F.Supp. 101), the courts applied a test based on whether a private corporation is subject to control by public authority ignoring the benefit and aid given to the private organization by the public. As was stated by the court in the *Eaton* case at page 195:

"The essence of this concept is that the present ability to control carries with it the responsibility for the present action of that which can be controlled . . . In short, the present ability to control must be determined by considering the total of all existing relationships between the corporation and the State." (See, also, *Dorsey v. Stuyvesant Town Corp.* (N.Y.1949), 87 N.E. 2d 541, 556 (dissent) see discussions in *Constitutional Restrictions on a Lessee of Public Property*, 42 Va. L.R. 647-665; McKay, *Segregation and Public Recreation*, 40 Va. L. Rev. 697-731; *State Action, A Study of Requirements Under the Fourteenth Amendment*, 1 Race Rel. L. Rep. 613, 631-636) involving lessees of state property and facilities, private organizations receiving state aid, and private

organizations performing quasi-governmental functions.)

This problem cannot be solved merely by a determination whether there is state action in a particular relationship between a fraternity and a state school. It would appear that there is probably state action in any kind of regulative or administrative action by a university or college which affects a student and that there is probably state action in a broad sense in any state law or judicial determination which establishes the legal consequences of the action of a university or college. In our opinion, however, the mere fact that there is state action does not solve the problem. The problem here involved is whether state action by the university or college in particular circumstances is constitutional (See Horowitz, *The Misleading Search For "State Action" Under the Fourteenth Amendment*, 30 So. Calif.L.Rev. 208 (1957)).

Certainly under the present law a state can constitutionally incorporate a fraternity which restricts its membership on the basis of race. It can permit it to sue in the courts and can give effect in probate proceedings to bequests to such a fraternity. Police and fire protection may be extended to such fraternities. Legal effect may be given to fraternity membership and other rules. These we believe are all forms of constitutional state action. For instance, a religious or other private organization unconnected with the State may limit its membership to members of a particular religion or other group and thus discriminate on the basis of race, religion or national origin (See Wash. Branch of A.A. of U.W. v. American Assoc. of U.W., (DC 1948) 79 F.Supp. 88; aff'd 175 F.2d 368; Op. New Jersey Atty. Gen., Dec. 8, 1955, 1 Race Rel. L. Rep. 611 [Summer camp operated by church may refuse admittance to other than certain races]). Private organizations unconnected with the State have a right to restrict their memberships as they see fit (4 Am. Jur., Associations and Clubs, §§ 11, 12, p.462; 5 Cal.Jur.2d, Associations and Clubs, §§ 12, 13, p.463; 7 C.J.S., Associations, § 23, p.56; Greenwood v. Building Trades Council, (1925). 71 Cal.App. 159, 173).

[No Public Organizations]

In the fraternity-state school relationship so far as we have been informed, no state school is

requiring membership in fraternities to be restricted on the basis of race. Moreover, the fraternities, so far as we can determine, are not public organizations but retain separate, private identities. The question presented is not whether the United States Constitution or public policy precludes private organizations from restricting membership on the basis of race. The question presented is whether, consistent with the equal protection clause of the United States Constitution and the public policy of the State of California a state school may create relationships with, permit use of public property by, give financial and other aid to, and exercise direct regulation and control over private organizations which restrict membership on racial and religious grounds. Characterized in this way the fraternity-state school problem is similar to the issue presented in *Ming v. Horgan* (Superior Court, California, County of Sacramento, No. 97130, June 23, 1958, 3 Race Rel. L. Rep. 693),—the California Superior Court case involving FHA-VA housing.

If a university supplies land and fraternity houses on campus, maintains strict control and regulation over fraternities, supplies paid faculty advisers, and supplies other administrative and financial assistance there is little doubt but that such a relationship with fraternities which restrict membership on the basis of race, color, creed, or religion would be invalid as against public policy and as a denial of equal protection under the Fourteenth Amendment of the United States Constitution (*Muir v. Louisville Park Theatrical Assoc.* (1954) 347 U.S. 971, vacating and remanding 202 F.2d 275; *Brown v. Bd. of Educ.* (1954) 347 U.S. 483). On the other hand, if a state university or college in recognizing or approving the existence of fraternities merely permits students to become members of such organizations, conferring no tangible benefits, and leaving the supervision with the parents or other persons outside the university except for control over the conduct of the fraternity members as students, the relationship of the state university or college with the fraternity under the cases thus far decided would not be violative of the United States Constitution or of public policy. Between these two extremes, however, the present nature of the cases makes it impossible to determine where the line might ultimately be drawn by the United States Supreme Court.

[No Supreme Court Ruling]

While it is clear that the United States Supreme Court has not as yet ruled on the problem of public school-fraternity relationships in the field of racial discrimination, that Court has stated it to be a fundamental principle that racial discrimination in public education is unconstitutional (*Brown v. Bd. of Education* (1955) 349 U.S. 294, 298). That Court also stated "All provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle." (p.298). In *Brown v. Board of Educ.* (1954) 347 U.S. 483, at p.493, that Court also stated that "*Today, education is perhaps the most important function of state and local government . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training; and in helping him for later professional to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*" (Emphasis added.)

That Court in that case, expressly gave consideration to factors other than tangible, and cited and quoted from *Sweatt v. Painter*, (1950) 339 U.S. 629 and *McLaurin v. Board of Regents*, (1950) 339 U.S. 637, in which the Court took into consideration the intangible factors which make for greatness in a law school, and the intangible factors of discussion, exchange of views, and comingling of students which make for a proper education and a proper training for a profession.

[Muir Case Significant]

Possibly the United States Supreme Court decision most significant to the question presented in this opinion is *Muir v. Louisville Park Theatrical Association* (1954) 347 U.S. 971, vacating and remanding 202 F.2d 275. That case involved a private theatrical association which leased a public amphitheatre in a public park for a limited number of dates during the summers to present operatic performances. The city did not participate either directly or indirectly in the operation of the private enterprise or in the presentation of the performances. The Court of Appeals for the Sixth Circuit in *Muir v. Louisville Park Theatrical Association*,

202 F.2d 275, held that the Louisville Park Theatrical Association, a private operating enterprise, was guilty of no unlawful discrimination, in violation of the Fourteenth Amendment, in refusing admission to colored persons to its operatic performances. The United States Supreme Court upon a petition for a writ of certiorari granted the petition and then stated: "The judgments are vacated and the cases are remanded for consideration in the light of the segregation case decision May 17, 1954, *Brown v. Board of Education*, ante, p.483, and conditions that now prevail" (347 U.S. 971; The Court of Appeal for the Sixth Circuit in an order dated October 14, 1954 vacated the case as moot on the grounds that the Louisville Park Theatrical Association provided that all tickets for its theatrical productions should be offered for sale to the general public thus assuring that the plaintiff, a Negro, could attend any of the performances if he so desired. See also, *Fla. ex rel Hawkins v. Bd. of Control*, (1956) 350 U.S. 413 where the United States Supreme Court in a case jointly decided with the *Muir* case recalled and vacated the mandate which remanded the cases for consideration in light of *Brown v. Board of Education* (1954) 347 U.S. 483 and instead remanded the *Hawkins* case on the authority of the *Brown* case.)

The *Muir* case has been followed and applied as precedent in many cases. (*Derrington v. Plummer*, (CA 5; 1956) 240 F.2d 922, 926; *Department of Conserv. etc. of Va. v. Tate*, (CA 4; 1956) 231 F.2d 615, 616; *Tonkins v. City of Greensboro*, (D.C.N.C., 1958) 162 F.Supp. 549, 555; *Tate v. Dept. of Conserv. etc. of Va.*, (DC Va; 1955) 133 F.Supp. 53, 58; *Fayson v. Beard*, (D.C.Tex; 1955) 134 F.Supp. 379, 381.)

It is our conclusion that the United States Supreme Court would hold close relationships between the state schools and fraternities, where the fraternities obtained substantial benefits and advantages from the state and were subject to strict controls by the State, to be unconstitutional as a denial of equal protection of the laws. Particularly is this true where, as in the *Muir* case, those benefits involved the use of public buildings and facilities.

PUBLIC POLICY

In California, in addition to the limits established by the Fourteenth Amendment, the doctrine of "public policy" established by James

v. Marinship Corp., (1944) 25 Cal.2d 721; Thompson v. Moore Drydock Co., (1946) 27 Cal.2d 595; and Williams v. International Bro. of Boilermakers, (1946) 27 Cal.2d 585, may result in the conclusion that a particular relationship between a fraternity and a state school is invalid. As an example, in the Marinship case, a closed labor union restricted its membership on the basis of race where it was in a closed shop relationship with the employer under a collective bargaining agreement. The Court there held that in something as vital as the earning of a living it was against public policy to permit discrimination on the basis of race. From those cases it is difficult to determine at what point the courts might feel that the state college and university relationship with restrictive fraternities would be against public policy. It is significant to note, however, that the court in that case stated at page 740: "... Although the constitutional provisions have been said to apply to state action rather than to private action, they nevertheless evidence a definite national policy against discrimination because of race or color ... The analogy of the public service cases not only demonstrates a public policy against racial discrimination but also refutes defendants' contention that a statute is necessary to enforce such a policy where private rather than public action is involved. ..." Possibly the line between validity and invalidity on the ground of public policy will be at a similar point as may ultimately exist under the equal protection clause. At least many of the same matters would need to be considered. Most of the state colleges and the university in one form or another have indicated that generally it is against their policy for fraternities to restrict their membership on the basis of race. The state colleges and universities all appear to be encouraging the fraternities to eliminate the restriction in their charters. Whether a court would conclude this to be

sufficient to establish public policy in regard to the present problem we are unable to determine. No state court at this time so far as we know has enunciated a public policy in regard to fraternity-state school relationships in the absence of a statute or an express school regulation. The Legislature in regard to the university and the state colleges also has not yet seen fit to establish such a public policy. So far as the university of California is concerned it might be that the Legislature has no power to establish public policy in this area since for most purposes policy for that school is exclusively within the control of the Board of Regents (Calif. Const. Art. IX, § 9; 30 Ops. Cal. Atty. Gen. 162, 166, and cases and other sources cited therein. But see, Tolman v. Underhill, (1952), 39 Cal.2d 708).

CONCLUSION

The types of relationships which are possible or exist between fraternities and sororities on one hand and the state universities and colleges in California on the other are almost unlimited in number. Certain relationships which are possible or exist between the state schools of higher education and the fraternities and sororities which restrict their membership on the basis of race would clearly be unconstitutional under the United States Constitution and also would be against the public policy of the State of California. On the other hand, other possible or existing relationships between state universities and colleges and fraternities and sororities restricting membership on the basis of race, religion, color, or national origin would be constitutional. The conclusions and analysis of this opinion do not affect the right of lodges, churches, and other private organizations unconnected with the State to restrict their memberships on the basis of race and religion.

BIBLIOGRAPHY

THIS BIBLIOGRAPHY is a supplement to the general bibliographical material appearing in Volume I of *Race Relations Law Reporter* at pages 501-508 (April, 1956) and pages 835-839 (August, 1956), and in Volume II, at pages 287-292 (February, 1957), and pages 913-918 (August, 1957), and in Volume III, at pages 589-599 (June, 1958) and pages 1279-1286 (December, 1958).

Books and Pamphlets

Abernethy, George L. *The Idea of Equality*. Richmond, Virginia, John Knox Press, 1959. 351 p. \$6.00.

An anthology concerning man's philosophical concepts of the nature of equality from early times of recorded history to the present.

Carter, Hodding. *The Angry Scar—The Story of Reconstruction*. Garden City, N.Y., Doubleday and Co., Inc., 1959. 425 p. \$5.95.

An account of the social, economic and political aspects of the reconstruction of the South following the Civil War.

Cox, Oliver Cromwell. *Caste, Class and Race*. New York, Monthly Review Press, 1959. 624 p. \$7.50.

An analysis and review of the social and ethnic background for present-day barriers of social caste, class distinction, and racial friction.

Dumond, Dwight L. *Antislavery Origins of the Civil War in the United States*. Ann Arbor, Michigan, University of Michigan Press, 1959. 133 p. \$____. (Paper backed).

A discussion of the role played by abolitionists in bringing about the Civil War.

du Plessis, Wentzel C. *Highway to Harmony: A Report of Relationships in South Africa*. New York, Information Service of South Africa. (Paper backed).

An address delivered by the Ambassador of the Union of South Africa to the United States at the Law School Forum of Harvard University on December 5, 1958, explaining the policies of South Africa's government.

Emerson, Thomas I., and Haber, David. *Political and Civil Rights in the United States*, 2d ed. 1958. Buffalo, N.Y., Dennis and Co., Inc. 1535 p. \$____.

A two-volume comprehensive collection of cases and materials dealing with civil and political liberties in the United States.

Johnson, Manning. *Color, Communism and Common Sense*. New York, Alliance, Inc., 1958. 78 p. \$1.00.

An account of the methods and appeals made by the communists in approaching the Negro as a class, as told by a Negro former communist.

Moskowitz, Moses. *Human Rights and World Order*. New York, Oceana Publications, Inc., 1958. 239 p. \$____.

A survey, by a representative of the Consultative Council of Jewish Organizations to the United Nations, of the struggle for human rights and freedoms.

Westmoreland, Frank E. *The South: Last Bulwark of America*. New York, Vantage Press, 1958. 175 p. \$3.50.

A statement of a Southerner's antipathy to the 1954 Supreme Court integration decision and of his fear of the destruction of Southern culture, customs and way of life.

Periodical Articles

du Plessis, Wentzel C. *The Way South Africa Looks at Its Race Problems*. 46 U.S. News and World Report (No. 8) 114-120 (1959).

An analysis, by the Ambassador of the Union

of South Africa to the United States, of his government's program to separate the races.

Kellog, Flint. *Villard and the NAACP*. 188 *The Nation* (No. 7) 137-140 (1959).

An account of some of the early history of the NAACP and an introduction of one of its early founding fathers, Oswald Garrison Villard.

Knoll, Erwin. *The Truth About Desegregation in the Washington, D.C. Public Schools*. 28 *Journal of Negro Education* (No. 2) 92-113 (1959).

A reprint of a seven-article series originally appearing in the *Washington Post and Times Herald* containing an analysis of the overall educational picture in Washington subsequent to integration of the races in the schools of that city.

Latham, Earl. *The Supreme Court and Civil Liberty*. American Government Annual, 1958-1959, 1-26 (1958).

An analysis of the problem of civil liberty, formulas of freedom and the critical reaction in light of recent Supreme Court decisions.

McBride, Thomas. *Human Rights*. 66 *Crisis* (No. 1) 7-12 (1959).

An address by the Attorney General of Pennsylvania to the 24th Annual Conference of the NAACP in which he states that equal rights will come despite hard-core opposition.

Mannes, Marya. *School Trouble in Harlem*. 20 *The Reporter* (No. 3) (1959).

A study of the causes and effects of *de facto* segregation in New York.

Murphy, Walter F. *The South Counterattacks: The Anti-NAACP Laws*. 12 *W. Pol. Q.* [No. 2] 371-390 (1959).

A consideration of the probable effect of Southern statutes concerning barratry and solicitation of money for racial litigation on the success of the legal activities of the NAACP.

Peltason, Jack. *Schools, Courts, Color and the Constitution*. American Government Annual, 1958-1959, 26-52 (1958).

A discussion of the beginnings of a generation of litigation from *Plessy v. Ferguson* to *Brown v. Board of Education*, and the legal strategy of segregation.

Ranney, Austin. *Politics, Parties and Civil War*. American Government Annual, 1958-1959, 53-72 (1958).

An inquiry into the effect of racial segregation upon the American party system.

Record, Wilson. *The Development of the Communist Position on the Negro Question in the United States*. 19 *The Phylon Quarterly* (No. 3) 306-326 (1958).

An analysis of the ideological origins of the communist position of the American Negro and the modifications of this position as a result of the present world situation.

Reed, David. *The Tragic Story of South Africa: An Eyewitness Report*. 46 *U.S. News and World Report* (No. 5) 56-59 (1959).

A report of the events surrounding the South African government's attempt to enforce total segregation and to confine the rights of the Negro.

Sampson, Anthony. *Little Rock and Johannesburg*. 188 *The Nation* (No. 2) 23-26 (1959). A discussion of the similarities between the American South and South Africa.

Smith, T.R. *The Christian and the Color Line*. 92 *The Christian Index* 8 (1959).

A development of the thesis that the color conflict is not confined to the black and white in the South, but is a nation-wide national minority problem.

Weissman, George L. *The Kissing Case*. 188 *The Nation* (No. 3) 46-49 (1959).

An attack on the imprisonment of two Negro boys, ages eight and nine, for kissing white girls, ages six and seven.

Wofford, Harris, Jr. *The Supreme Court as an Educator*. March 7, 1959, *Sat. Rev.* 13-15 (1959).

An exposition on the educational role played by the Supreme Court under our republican form of government, in connection with civil rights matters.

Discrimination and the Christian Conscience. 66 *Crisis* (No. 1) 15-19 (1959).

A statement issued by the Catholic Bishops of the United States at the close of their annual meeting, setting forth their view that enforced segregation cannot be reconciled with Christian principles.

Has Federal Power Won in Virginia? 46 U.S. News and World Report (No. 6) 36-37 (1959).

A brief survey of the effects of the collapse of "massive resistance" and of the newly proposed private tuition grant plan to maintain segregation.

How U.S. Judges Feel About the Supreme Court. 45 U.S. News and World Report (No. 17) 36-37 (1958).

A report and compilation of a questionnaire sent to all judges of the United States Courts of Appeals and District Courts concerning their personal views on the recent report adopted by the Conference of State Chief Justices condemning the alleged trend of the United States Supreme Court toward usurping authority.

Human Relations and the Moral Challenge. Nashville, Tenn., Fisk University, Race Relations Department, 1959. 64 p. \$0.50.

A condensation of presentations at the fifteenth annual Institute of Race Relations, Fisk University, June 30-July 12, 1958.

Judge Finds New York Schools Separate and Unequal. 46 U.S. News and World Report (No. 2) 82-83 (1959).

A report on the holding of the Children's Court Division of the Domestic Relations Court of New York City that schools in the city practiced de facto segregation and were in fact lacking in equality.

Mixed School Puzzle: South's Next Strategy. 46 U.S. News and World Report (No. 4) 78-79 (1959).

A discussion of the South's school plans, based on the premise that a little mixing is unavoidable but that no white child shall be compelled, against his wishes, to attend integrated schools.

"No Surrender," But Virginia Starts Over on Segregation. 46 U.S. News and World Report (No. 5) 70-72 (1959).

A report on Virginia's consideration of private tuition grants as a new way of preserving segregation.

Northern City Looks at its Race Problem. 46 U.S. News and World Report (No. 16) 64-66 (1959).

An analysis of population shifts by racial groups, with particular emphasis on Newark, New Jersey.

Private, Segregated Schools: 1959 results, 1960 Plans. 46 U.S. News and World Report (No. 14) 63-65 (1959).

A report from Virginia on private education for children.

Pro and Con in Growing Debate over Powers of Supreme Court. 45 U.S. News and World Report (No. 17) 110-118 (1958).

A statement of differing opinions on the current Supreme Court controversy, including: Schweppe, "Court Rewrites Constitution in its Own Image."

Jones, "Strictures on Supreme Court are Uncalled For."

Weintraub, "Right of a State Must Yield to Federal Needs."

Rogers, "Path to Desegregation Must Inevitably be Followed."

Terror by Bombing: The Story Back of It. 45 U.S. News and World Report (No. 17) 33-35 (1958).

An exposition concerning the behind-the-scenes sharpening of racial tension and suspected communist guidance of recent bombings of schools, churches and synagogues.

Where the South Goes Next on Mixed Schools. 46 U.S. News and World Report (No. 7) 41-43 (1959).

A brief statement of conditions in the South following the destruction of "massive resistance" showing a growing trend toward token integration supplemented by private schools.

A Symposium: *The Supreme Court Decision: Five Years Later.* May 23, 1959, Sat. Rev. 12. An analysis of what has happened in and to the South since the Supreme Court's desegregation decision in 1954, containing the following articles:

Carter, Hodding, *Problem and Prospect*

McGill, Ralph, *The Crisis of the City*

Ashmore, Harry S., *The Southern Style*

Carmichael, Omer, *A Workable Integration Plan*

Ball, Edward D., *How Much Progress?*

Legal Periodical Articles

Arthur Garfield Hays Memorial Fund. *Racial Integration and Academic Freedom.* 34 N.Y. U.L. Rev. 724-752 (1959).

An examination of the statutes of six Southern

states relating to public employees' advocacy of integration and membership by such persons in organizations which support that position.

DeGrazia, Alfred. *A New Way Toward Equal Suffrage*. 34 N.Y.U.L. Rev. 718-724 (1959).
A proposal of a plan to extend the right to vote without force or racial and sectional antagonism.

Franklin, Mitchell. *The Constitution, The Supreme Court and Integration*. 18 Law. Guild Rev. 153-155 (1958).

An approbation of the Supreme Court's decision in *Brown v. Board of Education* 347 U.S. 483 (1954), in which equality and the power of the federal government to secure same are stressed.

Franklin, Mitchell. *The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution*. 4 Howard L.J. 170-192 (1958).

A discussion of inconsistencies in the segregationist attack on the *School Segregation Cases*, arguing that the "third constitution"—the Thirteenth, Fourteenth and Fifteenth Amendments—created a democratic, national American state founded on the "second constitution"—the first ten amendments—and subordinating the so-called federalism of the first constitution of 1787.

Gomillion, C. G. *Civic Democracy And the Problems of Registration and Voting of Negroes in the South*. 18 Law. Guild Rev. 149-51 (1958).
An analysis of alleged discrimination against Negro voters in the South through poll taxes, literacy requirements, and discretionary powers of voter registrars.

Howe, Mark DeWolfe. *Religion and Race in Public Education*. 8 Buffalo L. Rev. 242-251. (1959).

A suggestion of the importance of the role of history and the value of moderation in the resolution of constitutional questions and segregation problems.

Jenkins, Thomas. *Judicial Discretion in Desegregation: The Hawkins Case*. 4 Howard L.J. 193-202 (1958).

A discussion of the judicial history of the at-

tempt of a Negro to be admitted to the University of Florida School of Law.

McLeod, Grover S. *A Program for Private Schools*. 20 Ala. Law. 73-77 (1959).

A plan offered by a member of the Alabama Bar for a system of private schools in Alabama, with emphasis on state tuition grants and use of church facilities.

Pollit, Daniel H. *Should the Supreme Court be "Curbed"? A Presentation of Civil Liberties Decisions in the 1957-58 Term*. 37 N.C.L. Rev. 17-57 (1958).

A review of fifty civil liberties decisions handed down in the 1957-58 term of the Supreme Court of United States, shedding light on the recent attacks on the Court.

Riley, Lloyd H. *Miscegenation Statutes—A Re-evaluation of Their Constitutionality in Light of Changing Social and Political Conditions*. 32 So. Calif. L. Rev. 28-48 (1958).

An examination of the constitutionality of anti-miscegenation statutes, concluding that the Supreme Court will find them unconstitutional when called upon to decide the issue.

Wormuth, Francis D. *The Present Status of the Civil Rights Act of 1875*. 6 Utah L. Rev. 153-168 (1958).

An examination of the courts' interpretation of the Civil Rights Act of 1875, concluding that there is no constitutional impediment to the application of the act in states where a state law requires segregation.

Note. *Civil Rights in Wyoming*. 13 Wyo. L. J. 76-83 (1958).

Discussion and analysis of the civil rights legislation [Wyo. Comp. Stat. §§ 9-836, 9-837 (Supp. 1957)] passed in Wyoming in February, 1957.

Note. *Little Rock School Litigation—Re-examination of North Carolina Laws*. 37 N.C.L. Rev. 177-184 (1959).

An analysis of the probable legal effect of *Cooper v. Aaron*, 358 U.S. 1 (1958) on the North Carolina Pupil Assignment Law and local option plan.

Note. *The Law, the Mob, and Desegregation*. 47 Calif. L. Rev. 126-43 (1959).

A consideration of community opposition to integration of public schools and the attendant problem of enforcement presented thereby.

Recent Cases

- Cooper v. Aaron*, 358 U.S. 1 (1958), 4 Race Rel. L. Rep. 17 (1959).
Request of the Little Rock School Board for a two and one-half year delay of racial integration rejected on the ground that to accede to postponement amounts to nullification of law by mob violence.
23 Albany L. Rev. 405 (1959).
- Evers v. Dwyer*, 79 S.Ct. 178 (1958), 3 Race Rel. L. Rep. 743 (1958).
"Actual controversy" found to be presented by case even though appellant Negro boarded bus in Memphis on only one occasion solely for the purpose of bringing action for declaratory judgment on validity of Tenn. Code Ann. §§ 1704-1709 (1955), which required segregated seating on buses.
30 Miss. L. J. 329 (1959).
- In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, cert. denied, 357 U.S. 570, rehearing denied, 358 U.S. 858 (1958), 3 Race Rel. L. Rep. 188 (1958).
Judgment of the Supreme Court of Pennsylvania by which the appointment of thirteen private persons as trustees of Girard College to replace the Board of Directors of City Trusts was denied review by the Supreme Court.
47 Geo. L. J. 391 (1958).
34 N.Y.U.L. Rev. 152 (1959).
20 Ohio St. L. J. 132 (1959).
- In the Matter of Charlene Skipwith and Another*, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958).
Board of Education of the City of New York cannot constitutionally invoke criminal sanctions against Negro and Puerto Rican parents who refuse to send their children to a "de facto" segregated school.
23 Albany L. Rev. 412 (1959).
- Ming v. Horgan*, Superior Court, County of Sacramento, California, June 23, 1958, No. 97130, 3 Race Rel. L. Rep. 693.
State licensing of real estate agents, federal mortgage guaranties, building inspection and advertising amounted to governmental action so as to bring a refusal to sell real estate solely on the basis of race within the prohibition of the Fifth and Fourteenth Amendments.
44 Va. L. Rev. 1173 (1958).
- NAACP v. Alabama*, 357 U.S. 449 (1958), 3 Race Rel. L. Rep. 611 (1958).
State may not compel NAACP to disclose names of its members.
5 How. L. J. 112 (1959).
20 Ohio St. L. J. 123 (1959).
- NAACP v. Patty*, 159 F.Supp. 503 (E.D. Va. 1958), 3 Race Rel. L. Rep. 274.
Application to the normal activities of the NAACP of the Virginia statutes which punish barratry and require registration and filing of information would be unconstitutional.
34 Notre Dame Law. 127 (1958).
- Ratcliff v. State*, 107 So.2d 728 (Miss. 1958), 4 Race Rel. L. Rep. 127 (1959).
Cohabitation between white person and Negro held not punishable under § 2000, Code of 1942 (Miss.) since incest made element of crime by the statute and such cohabitation is "miscegenetic" and not "incestuous."
30 Miss. L. J. 326 (1959).
- Sharnay Hosiery Mills, Inc.*, 120 N.L.R.B. No. 102, 3 Race Rel. L. Rep. 564 (May 1, 1958).
Appeal by petitioning union that injection of racial issue by the employer created an atmosphere of hate and bias against it denied.
58 Colum. L. Rev. 1084 (1958).
- State v. Clyburn*, 247 N.C. 455, 101 S.E.2d 295 (1958), 3 Race Rel. L. Rep. 218 (1958).
Conviction of defendant Negroes of criminal trespass, after they had entered the portion of an ice cream parlor reserved for whites and refused to leave on request, was affirmed by the North Carolina Supreme Court, which concluded that appellants showed no state action to have been present within the prohibition of the Fourteenth Amendment.
37 N.C.L. Rev. 73 (1958).
- Tonkins v. City of Greensboro*, 162 F.Supp. 549 (M.D. N.C. 1958), 3 Race Rel. L. Rep. 704 (1958).
Complaint seeking injunction against city officials in their closing of municipal pools to avoid integration dismissed because no violation of equal protection found.
72 Harv. L. Rev. 1567 (1958).

TABLE OF CASES

Cumulative, 1959

IN THIS LISTING, the official style of each case in the two 1959 issues and its citation, if any, appear in *italic* type. The reverse citations are in Roman type. A complete table of cases for the first two volumes of RACE RELATIONS LAW REPORTER appears at 2 Race Rel. L. Rep. 1233, and a complete table of cases for Volume Three appears at 3 Race Rel. L. Rep. 1301.

<i>Aaron v. Cooper</i> , USDC, ED Ark., 169 F.Supp. 325	IV: 17	<i>Barta et al. v. Oglala Sioux Tribe of Pine Ridge Reservation of South Dakota</i> , USCA, 8th Cir., 259 F.2d 553	IV: 346
<i>Aaron v. McKinley</i> , USDC, ED Ark., 169 F.Supp. 325	IV: 17	<i>Certiorari denied</i> , USSC, 79 S.Ct. 320	IV: 12
<i>Abrams</i> ; Application of Lake Placid Club, Inc., v.	IV: 159	<i>Bates v. City of Little Rock</i> , Ark. Sup Ct. 319 S.W.2d 37	IV: 136
<i>Ackley-Maynes Co., Inc.</i> ; New York SCAD v.	IV: 358	<i>Certiorari granted</i> , USSC, 79 S.Ct. 1118	IV: 252
<i>Alabama</i> ; State of; United States v.	IV: 322	<i>Bd of Ed of St. Mary's County v. Groves</i> , USCA, 4th Cir., 261 F.2d 527	IV: 25
<i>Alexandria</i> , School Bd of; Jones v.	IV: 29	<i>Bd of Managers of James Walker Memorial Hospital</i> ; Eaton v.	IV: 131
<i>Allen et al. v. School Bd of City of Charlottesville, Va. et al.</i> , USCA, 4th Cir., 263 F.2d 295	IV: 39	<i>Bd of Public Instruction of Dade County, Fla. et al.</i> , Gibson v.	IV: 21
<i>Allen et al. v. School Bd of Prince Edward County, Va.</i> USCA, 4th Cir., 266 F.2d 507	IV: 297	<i>Bennett, ex al.</i> ; NAACP v.	IV: 349
<i>Stay denied</i> , USSC, 79 S.Ct. 1443	IV: 256	<i>Brady v. TransWorld Airlines, Inc. et al.</i> , USDC, D. Del. 167 F.Supp. 469	IV: 333
<i>Allen et al.</i> ; School Bd of City of Charlottesville v.	IV: 39	<i>Breger, M. & Co. et al.</i> ; Spampinato v.	IV: 95
<i>Almond</i> ; James v.	IV: 46	<i>Bristol et al. v. Heaton et al., certiorari denied</i> , USSC, 79 S.Ct. 802	IV: 12
<i>Application of Lake Placid Club, Inc., v. Abrams</i> , 180 N.Y.S.2d 254	IV: 159	<i>Petition for rehearing denied</i> , 79 S.Ct. 1123	IV: 251
<i>Arkansas</i> , State of, ex rel. Bruce Bennett; NAACP v.	IV: 14, 142	<i>Bristol, et al.</i> ; Heaton v.	IV: 302
<i>Arkansas</i> , State of; NAACP v.	IV: 14	<i>Brown</i> ; State v.	IV: 334
<i>Arnold et al.</i> ; Hunt et al. v.	IV: 79	<i>Brown v. United States</i> , USCA, 4th Cir., 262 F.2d 50	IV: 178
<i>Bailey v. Henslee</i> , USDC, ED Ark., 168 F.Supp. 314	IV: 170	<i>Brucker et al.</i> ; Seneca Nation of Indians v.	IV: 136
<i>Barnes et al.</i> ; State Tax Commission v.	IV: 347	<i>Buchanan et al.</i> ; Evans et al. v.	IV: 257

- Bullock et al. v. United States, USCA, 6th Cir., 265 F.2d 683* IV: 285
Certiorari denied, USSC, 79 S.Ct. 1294 IV: 252
- Bullock v. Tamiami Trail Tours, Inc., USCA, 5th Cir., 266 F.2d 326* IV: 361
- Burton v. Wilmington Parking Authority et al., Ct in Chancery, New Castle Co., Delaware, 150 A.2d 197* IV: 353
- Cardwell, Jones and, v. People of State of California* IV: 253
- Carmen, Reyna Tom, petition of* IV: 313
- Charlottesville, School Bd of City of, v. Allen* IV: 39
- Cline v. State, Sup Ct of Tenn., 319 S.W.2d 227* IV: 88
- City of Jacksonville, Hampton v.* IV: 339
- City of Little Rock; Bates v.* IV: 14, 136
- City of Norfolk; Dawley v.* IV: 130
- City of North Little Rock; Williams v.* IV: 136
- Cohen v. Public Housing Administration et al., certiorari denied, 79 S.Ct. 315* IV: 12
- Cole; State v.* IV: 308
- Coleman; State v.* IV: 387
- Commonwealth of Virginia ex. rel. Comm. on Law Reform and Racial Activities; Scull v.* IV: 247
- Cooke et al. v. State of North Carolina, Jurisdiction postponed, 79 S.Ct. 312 Appeal dismissed as abated, 79 S.Ct. 737* IV: 13
- Cooper; Aaron v.* IV: 17
- County School Bd of Arlington Co., Va.; Hamm v.* IV: 36, 296
- County School Bd of Arlington County, Va. et al. v. Hamm et al., Motion for recall and stay of mandate denied,.....S.Ct.....* IV: 14
- County School Bd of Arlington Co., Va., v. Deskins, USCA, 4th Cir., 263 F.2d 226* IV: 36
USCA, 4th Cir., 264 F.2d. 945 IV: 296
- County School Bd of Prince Edward County; Allen et al. v.* IV: 297
- Covington v. Edwards, USCA, 4th Cir., 264 F.2d 780* IV: 278
- Curtis v. Tower et al., USCA, 3rd Cir., 262 F.2d 166* IV: 310
- Dawley v. City of Norfolk, Va., USCA, 4th Cir., 260 F.2d 647* IV: 130
Certiorari denied, 79 S.Ct. 650 IV: 12
- Day; Harrison v.* IV: 65
- Deskins; County School Bd of Arlington County, Va. v.* IV: 36, 296
- Devlin et al.; Watson v.* IV: 93
- Duckworth; James v.* IV: 55, 58
- Eaton et al. v. Bd of Managers of James Walker Memorial Hospital et al., USCA, 4th Cir., 261 F.2d 521* IV: 131
Certiorari denied, 79 S.Ct. 941 IV: 253
- Edwards; Covington v.* IV: 278
- Evans et al. v. Buchanan et al., USDC, D. Del., 172 F.Supp. 508* IV: 257
- Evans v. Ross, Camden County Ct, Law Div., 150 A.2d 512* IV: 355
- Ex parte NAACP, Sup Ct of Ala., 109 So.2d 138* IV: 347
Certiorari granted and judgment reversed, (sub nom NAACP v. State of Alabama ex rel. Patterson) USSC, 79 S.Ct. 1001 IV: 254
- Federal Power Commission; Tuscarora Indian Nation v.* IV: 344
- Fletcher; State of La. v.* IV: 173
- Florida, Dade County Bd of Public Instruction; Gibson et al. v.* IV: 21
- Florida Legislative Investigation Committee; Graham v.* IV: 143
- Frazier v. State of Florida, Sup Ct of Fla., 107 So.2d 16* IV: 173
- Frisbee et al; United States of America v.* IV: 343
- Garifine v. Monmouth Park Jockey Club, Sup Ct of N.J., 148 A.2d 1* IV: 160
- George Washington Memorial Park Cemetery Ass'n., in the Matter of* IV: 158

Georgia Public Service Comm; Williams v.	IV: 166	<i>Petition for rehearing denied</i> , USSC, 79 S.Ct. 1123	IV: 251
<i>Gibson et al. v. Bd of Public Instruction of Dade County, Fla. et al.</i> , USDC, SD Fla., Miami Div., 170 F.Supp. 454	IV: 21	Henslee; Bailey v.	IV: 170
<i>Gibson et al. v. Florida Legislative Investigation Committee</i> , Sup Ct of Fla., 108 So.2d 729	IV: 143	Hollywood Professional Schools et al.; Reed v.	IV: 305
<i>Judgment stayed</i> , 79 S.Ct. 576	IV: 13	<i>Holt v. Raleigh City Bd of Education</i> , USCA, 4th Cir., 265 F.2d 95	IV: 281
<i>Certiorari denied</i> , USSC, 79 S.Ct. 1433	IV: 253	<i>Docketed</i> , USSC, June 12, 1959	IV: 255
<i>Ginsburg v. Stern</i> , et al., USCA, 3rd Cir., 263 F.2d 457	IV: 309	<i>Hunt et al. v. Arnold et al.</i> , USDC, ND Ga., Atl. Div., 172 F.Supp. 847	IV: 79
<i>Docketed</i> , USSC, June 13, 1959	IV: 255	<i>In re State ex rel. Patterson v. NAACP</i> , Sup Ct of Ala., 109 So.2d 138	IV: 347
Giordano; Tullier v.	IV: 329	<i>Certiorari granted and judgment reversed</i> , USSC, 79 S.Ct. 1001	IV: 252
Goldsby, United States ex. rel., v. Harpole	IV: 377	<i>In re Wallace</i> , USDC, MD Ala., N.D., 170 F.Supp. 63	IV: 97
<i>Graham v. Florida Legislative Investigation Committee</i>	IV: 143	<i>In the Matter of George Washington Memorial Park Cemetery Association</i> , Superior Ct of N.J., Chancery Div., 145 A.2d 665	IV: 158
Groves; Bd of Ed of St. Mary's County v.	IV: 25	<i>In the Matter of Jones and O'Meara</i> , Washington St Bd Against Discrimination, Case #h-498	IV: 485
<i>Grove v. Smyth</i> , USDC ED Va., 169 F.Supp. 852	IV: 311	<i>In the Matter of the Application of New York SCAD v. Ackley-Maynes Co.</i> , N.Y. Supreme Ct.	IV: 358
<i>Hamm v. County School Bd of Arlington Co., Va.</i> , USCA, 4th Cir., 263 F.2d 226	IV: 36	<i>In the Matters of Skipwith et al.</i> , Domestic Rel Ct of New York City, Children's Ct Div., 180 N.Y.S.2d 852	IV: 264
<i>Motion for recall and stay of mandate denied</i> , USSC	IV: 14	Jacksonville, City of; Hampton v.	IV: 339
USCA 4th Cir., 264 F.2d 945	IV: 296	Jameson; State ex rel. Hollow Horn Bear v.	IV: 342
<i>Hampton v. City of Jacksonville</i> , USDC, SD Fla., No. 4073-Civil-J	IV: 339	<i>James v. Almond</i> , USDC, ED Va., Norfolk Div., 170 F.Supp. 331	IV: 45
<i>Hannahville Indian Community et al. v. Prairie Band of Potawatomi Indians et al.</i> , USSC, 79 S.Ct. 587	IV: 12	<i>James v. Duckworth</i> , USDC, ED Va., Norfolk Div., 170 F.Supp. 342	IV: 55, 58
Harpole; United States ex rel. Goldsby v.	IV: 377	Jenkins; State v.	IV: 177
<i>Harrison v. Day</i> , Sup Ct of Appeals of Va., 106 S.E.2d 636	IV: 65	<i>Jones and Cardwell v. People of the State of California</i> , USSC, 79 S.Ct. 801	IV: 253
<i>Heaton et al. v. Bristol et al.</i> , Ct of Civil Appeals of Texas, 317 S.W.2d 86	IV: 302	Jones and O'Meara; In the matter of	IV: 485
<i>Certiorari denied</i> , USSC, 79 S.Ct. 802	IV: 12	<i>Jones et al. v. School Board of Alexandria</i> , USDC, ED Va.	IV: 29

- Kasper v. United States*, USCA, 6th Cir., 265 F.2d 683 IV: 285
Certiorari denied, USSC, 79 S.Ct. 1294; 79 S.Ct. 1452 IV: 252
- Lake Placid Club, Inc.*, Application of, v. Abrams IV: 159
- Lee, Williams v.* IV: 9
- Little Rock, City of; Bates v.* IV: 14, 136
- Louisiana, State of; v. Jenkins* IV: 177
- Louisiana, State of; v. Rue* IV: 177
- Louisiana, State of; v. Brown* IV: 334
- McGee; Nichols v.* IV: 340
- Mabry v. State*, Ct of Appeals of Alabama, 110 So.2d 250 IV: 312
- Maryland, St. Mary's County Bd of Ed; Groves v.* IV: 25
- McKinley; Aaron v.* IV: 17
- Monmouth Park Jockey Club; Garifine v.* IV: 160
- Moralez v. State*, Ct of Criminal Appeals of Texas, 320 S.W.2d 340 IV: 387
- NAACP; State ex rel. Patterson v.* IV: 252
- NAACP v. Bruce Bennett, Attorney General of the State of Arkansas*, USDC, ED Ark., Civil Action No. 3664 IV: 349
Judgment vacated, USSC, 79 S.Ct. 1192 IV: 254
- NAACP v. State of Arkansas ex rel. Bruce Bennett, Attorney General*, Sup Ct of Ark., 319 S.W.2d 33 IV: 142
Certiorari denied, USSC, 79 S.Ct. 1293 IV: 253
- NAACP v. State of Alabama ex rel. Patterson*, Sup Ct. of Ala., 109 So.2d 138 IV: 347
Certiorari granted and judgment reversed, USSC, 79 S.Ct. 1001 IV: 254
- NAACP v. Williams*, Ct. of Appeals of Ga., 107 S.E.2d 243 IV: 351
Certiorari denied, USSC, 79 S.Ct. 947 IV: 253
- Neco Electrical Products Corp. and Internat'l. Union of Electrical, Radio & Machine Workers, AFL-CIO, NLRB case No. 15-CA-1093* IV: 481
- New York, State of; St. Regis Tribe of Mohawk Indians v.* IV: 343
- Nichols v. McGee*, USDC, ND Calif., 169 F.Supp. 721 IV: 340
- Oglala Sioux Tribe of Pine Ridge Reservation of South Dakota et al; Barta et al. v.* IV: 346
- Oliphant et al. v. Brotherhood of Locomotive Firemen and Enginemen*, *Certiorari denied*, USSC, 79 S.Ct. 648, *Rehearing denied*, USSC, 79 S.Ct. 796 IV: 13
- O'Meara, Jones; In the Matter of* IV: 485
- People of the State of California, Jones and Cardwell v.* IV: 253
- People v. Rogers*, USDC, Md., 168 F.Supp. 573 IV: 96
- Perry; State v.* IV: 366
- Petition of Reyna Tom Carmen for a Writ of Habeas Corpus*, USDC, ND California, Div., 165 F.Supp. 942 IV: 313
- Prince Edward County, County School Bd of; Allen v.* IV: 297
- Raines; United States v.* IV: 314
- Raleigh City Bd of Ed; Holt v.* IV: 281
- Ratcliff v. State*, 107 So.2d 728 IV: 127
- Reed v. Hollywood Professional School, et al.*, Superior Ct., App. Dept., Los Angeles County, Calif. 338 P.2d 633 IV: 305
- Rogers; People v.* IV: 96
- Rosenblatt v. Florida Legislative Investigation Committee* IV: 143
- Rose v. State*, Miss. Sup Ct., 107 So.2d 730 IV: 129
- Ross; Evans v.* IV: 355
- Rue; State of Louisiana v.* IV: 177
- St. Mary's County Bd of Ed; Groves v.* IV: 25

<i>St. Regis Tribe of Mohawk Indians, etc. v. State of New York</i> , Ct of Appeals of N.Y., 5 N.Y.2d 24, 177 N.Y.S.2d 289 <i>Certiorari denied</i> , USSC, 79 S.Ct. 586	IV: 343 IV: 13	State of Louisiana; Rue v.	IV: 177
<i>Petition for rehearing denied</i> , USSC, 79 S.Ct. 1146	IV: 251	<i>State of Louisiana v. Fletcher</i> , Sup Ct of La., 106 So.2d 709	IV: 173
School Bd of Alexandria; Jones v.	IV: 29	State of Tennessee; Cline v.	IV: 88
<i>School Bd of the City of Charlottesville Va. et al. v. Allen, et al.</i> , USCA, 4th Cir., 263 F.2d 295	IV: 39	State; Ratchiff v.	IV: 127
<i>Scully v. Commonwealth of Virginia ex rel. Comm. on Law Reform and Racial Activities</i> , USSC, 79 S.Ct. 838	IV: 247	State; Rose f.	IV: 129
<i>Seneca Nation of Indians v. Brucker, et al.</i> , USCA, D.C.Cir., 262 F.2d 27 <i>Certiorari denied</i> , USSC, 79 S.Ct. 1294	IV: 136 IV: 254	<i>State Tax Commission v. Barnes et al.</i> , County Ct., Franklin County, N.Y., 178 N.Y.S.2d 932; 185 N.Y.S.2d 781	IV: 347
Skipwith et al., in the matters of,	IV: 264	<i>State v. Brown</i> , Sup Ct of La., 108 So.2d 233	IV: 334
<i>Smith v. United States</i> , USCA, 4th Cir., 262 F.2d 50	IV: 178	<i>State v. Coleman</i> , 109 So.2d 534	IV: 387
Smyth; Grove v.	IV: 311	<i>State v. Cole</i> , Sup Ct of N.C., 107 S.E.2d 732	IV: 308
South Gate Estates, Inc; Waite v.	IV: 482	<i>State v. Jenkins</i> , Sup Ct. of La., 107 So.2d 632	IV: 177
<i>Spampinato v. M. Breger & Co. et al.</i> , USDC, ED N.Y., 166 F.Supp. 33	IV: 95	<i>Certiorari denied</i> , USSC, 79 S.Ct. 1135	IV: 253
<i>State Athletic Commission v. Dorsey</i> , USSC, <i>Affirmed on Appeal</i> , 79 S.Ct. 1137; <i>Petition for rehearing denied</i> , USSC 79 S.Ct. 1446	IV: 251	<i>State v. Perry</i> , Sup Ct of N.C., 108 S.E.2d 447	IV: 366
State; Cline v.	IV: 88	<i>State v. Rue</i> , La Sup Ct, 107 So.2d 702	IV: 177
<i>State ex rel. Hollow Horn Bear v. Jameson</i> , Sup Ct. of S.Dak., 95 N.W.2d 181	IV: 342	State; Williams v.	IV: 373
State ex rel. Patterson v. NAACP	IV: 347	Stern et al; Ginsburg v.	IV: 309
State, Mabry v.	IV: 312	<i>Syres v. Oil Workers International Union, Local 23 et al.</i> , <i>Certiorari denied</i> , USSC, 79 S.Ct. 315	IV: 13
State of Alabama; United States v.	IV: 322	Tamiami Trail Tours; Inc; Bullock v.	IV: 361
State of California, People of; Jones and Cardwell v.	IV: 253	Tennessee, State of; Cline v.	IV: 88
State of Florida; Frazier v.	IV: 173	Teplow v. Florida Legislative Investigation Committee	IV: 143
State of Louisiana; Jenkins v.	IV: 177	Tower et al; Curtis v.	IV: 310
		Transworld Airlines, Inc., et al; Brady v.	IV: 333
		<i>Tullier v. Giordano</i> , USCA, 5th Cir., 265 F.2d 1	IV: 329
		<i>Tuscarora Indian Nation v. Federal Power Commission</i> , USCA, D.C.Cir., 265 F.2d 338,	IV: 344

<i>Certiorari granted</i> , USSC,S.Ct., (Nos. 911 & 921)	IV: 252	<i>Certiorari denied</i> , 79 S.Ct. 650	IV: 13
<i>Tuscarora Nation of Indians v. Power</i> <i>Authority of the State of New York,</i> USSC		<i>United Steelworkers of America, Local</i> <i>No. 2708, Whitfield v.</i>	IV: 122
<i>Petition for rehearing denied</i> , 79 S.Ct. 1431, No. 384	IV: 252	<i>Virginia, Norfolk, City of; Dawley v.</i>	IV: 130
<i>United States; Brown v.</i>	IV: 178	<i>Wallace, in re</i>	IV: 97
<i>United States; Bullock v.</i>	IV: 285	<i>Watson v. Devlin et al., USDC, ED</i> <i>Mich., 167 F.Supp. 638</i>	IV: 93
<i>United States; Kasper v.</i>	IV: 285	<i>Whitfield v. United Steelworkers of</i> <i>America, Local No. 2708, USCA, 5th</i> <i>Cir., 263 F.2d 546</i>	IV: 122
<i>United States ex rel. Goldsby v. Har-</i> <i>pole, USCA, 5th Cir., 263 F.2d 71</i>	IV: 377	<i>Certiorari denied, USSC, 79 S.Ct.</i> <i>1285</i>	IV: 254
<i>Docketed, USSC, June 12, 1959</i>	IV: 255	<i>Williams; NAACP v.</i>	IV: 351
<i>United States of America v. C. E. Fris-</i> <i>bee et al., USDC, Montana, Great</i> <i>Falls Div., 165 F.Supp. 883</i>	IV: 343	<i>Williams v. City of North Little Rock,</i> <i>Sup Ct of Ark., 319 S.W.2d 37</i>	IV: 136
<i>United States; Smith v.</i>	IV: 178	<i>Williams v. Georgia Public Service</i> <i>Commission, USDC, ND Ga., Jan. 21,</i> <i>1959</i>	IV: 166
<i>United States v. Raines, USDC, MD</i> <i>Ga., 172 F.Supp. 552</i>	IV: 314	<i>Williams v. Lee, USSC, 79 S.Ct. 269</i>	IV: 9
<i>Jurisdiction postponed, USSC, 79</i> <i>S.Ct. 1448</i>	IV: 255	<i>Williams v. State, Ct of Criminal Ap-</i> <i>peals, Texas, 321 S.W.2d 72</i>	IV: 373
<i>United States v. State of Alabama, etc.,</i> <i>USDC, MD Ala., 171 F.Supp. 720</i>	IV: 322	<i>Certiorari denied, USSC, 79 S.Ct. 615</i>	
<i>United States v. The Kiowa, Comanche</i> <i>and Apache Tribes of Indians, etc.</i> USSC		<i>Wilmington Parking Authority; Burton</i> <i>v.</i>	IV: 353







